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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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**No. 506**

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WILLIAM WALTER REMINGTON,
*Petitioner,*

*against*

UNITED STATES OF AMERICA,
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, William Walter Remington, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## Opinions Below

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Learned Hand have not yet been reported, but are printed as Appendix B to this petition for the convenience of the Court (pp. 45-59, *infra*).

An earlier opinion of the Court of Appeals in this same matter is reported at 191 F. 2d 246 and certiorari was denied at 343 U. S. 907. See also 342 U. S. 895.

## Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 24, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

## Questions Presented

1. Whether petitioner, who was reindicted for perjury while testifying in his own defense under an earlier indictment for perjury, was deprived of due process of law under the circumstances of this case, namely, that the grand jury foreman and prosecutor, collaborator and former attorney of the chief prosecution witness respectively, engaged in oppression and deceit in the grand jury room in obtaining that earlier indictment and that the United States Attorney withheld and suppressed evidence of these grand jury improprieties from the defense at the very time petitioner was giving the testimony upon which the reindictment was based.

2. Whether, as Judge Learned Hand held in his dissenting opinion below, a reindictment under such circumstances conflicts with the decision of this Court in the *Silverthorne* case.

3. Whether, as Judge Learned Hand also held in his dissenting opinion, a reindictment under such circumstances constitutes unlawful entrapment under the doctrine of the *Sorrells* case.

4. Whether the maintenance of the integrity of the grand jury system and of the processes of law requires a dismissal of an indictment so procured.

## Statute Involved

18 U. S. C. § 1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be admin-

istered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773.''

## Summary Statement of the Facts

Petitioner was indicted (R. xviii) [1] in the Southern District of New York on June 8, 1950, for an alleged violation of the perjury statute in denying to the indicting grand jury that he had ever been a member of the Communist Party. Petitioner's conviction was reversed by the Court of Appeals on the ground, among others, that the judge's charge to the jury concerning membership in the Communist Party was erroneous. 191 F. 2d 246. A petition for certiorari, sought by petitioner for the purpose of obtaining a dismissal of the indictment for gross improprieties in the grand jury room, was denied by this Court on March 24, 1952. 343 U. S. 907.

While the petition for certiorari was pending in this Court, petitioner was reindicted (S. I-VI) on October 25, 1951, in the Southern District of New York on charges that, while testifying in his own defense at his trial under the first perjury indictment, he had testified falsely in denying

[1] Whenever the record designation "R" is used, it refers to the page number of the record of the trial on the first indictment, which is available in the office of the Clerk of this Court. No. 387, October Term, 1951, 343 U. S. 907. Whenever the record designation "S" is used, it refers to the page number of the record of the trial on the reindictment, review of which is herein sought. Because of financial inability to print the record herein, which includes an 1100-page transcript, petitioner submits with this petition a motion to dispense with the printing of the record for purposes of considering this petition for certiorari. See Appendix A (pp. 43-44, *infra*).

(I) that he ever knowingly attended Communist Party meetings, (II) that he had given information to one Elizabeth Bentley to which she "was not entitled", (III) that he had ever paid Communist Party dues, (IV) that he ever asked anyone to join the Communist Party, and (V) that he had any knowledge of the existence of the Young Communist League at Dartmouth College, where he had been a student from 1934 to 1939.[2] Petitioner was convicted under counts II and V (S. 1111); he was acquitted on count IV (S. 1111); and the jury was unable to agree on counts I and III (S. 1112). Petitioner was sentenced to three years in the penitentiary on each count, the two sentences to run concurrently (S. 1140), and petitioner is presently in the penitentiary serving his sentence. Upon appeal, the United States Court of Appeals, with Judge Learned Hand dissenting, affirmed the conviction.

Petitioner bottoms his petition upon the following summary of the relevant facts in the record of the proceedings under the two indictments:

(1) At the time of the first indictment, the foreman of the indicting grand jury, John Brunini, was the financial and literary collaborator of the chief prosecution witness, Elizabeth Bentley, in the preparation and publication of a book in which she repeated her accusation that petitioner had been a member of the Communist Party and the success of which depended upon petitioner's indictment.

(2) The prosecution's case was presented to this grand jury by Mr. Thomas E. Donegan, a Special Assistant to

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[2] Although petitioner repeatedly denied past membership in the Communist Party while testifying at the first trial, no count covering this denial was included in the reindictment. Indeed the Government informed this Court, while the petition for certiorari to review the earlier indictment for denying past membership in the Communist Party was pending, that it did "not intend to press that charge . . ." *Motion by the United States for Leave to Apply to the District Court for Leave to Dismiss the Indictment*, p. 3, 342 U. S. 895.

the Attorney General, who had previously been Bentley's personal attorney in a litigation arising out of her espionage activities.

(3) Brunini and Donegan, in conduct which Judge Learned Hand described as "oppression and deceit in procuring the indictment" (p. 56, *infra*), deceived Mrs. Ann Remington, petitioner's ex-wife concerning her legal rights before this grand jury and, holding her as a witness there until she became fuzzy and incoherent from want of food, induced her to change her testimony from that entirely favorable to her ex-husband to the testimony which ultimately convicted him.

(4) Brunini and Donegan interrogated petitioner during a five-day grilling before this grand jury on matters, many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and petitioner as to whether he had ever been a member of the Communist Party, and finally asked him the crucial question for the denial of which he was indicted.

(5) One of the first witnesses before the grand jury was Mr. Joseph A. Egan, Bentley's personal counsel, who did not know petitioner but had represented Bentley in the preparation of the defense of a libel suit based on her charge that petitioner was a Communist, and whose testimony could only have been incompetent and prejudicial.

(6) United States Attorney Saypol deliberately withheld from petitioner's counsel information concerning the collaboration of Bentley and Brunini and the gross misconduct in the grand jury room and then sought to suppress the evidence when it became known to petitioner's counsel from other sources.

(7) Petitioner was reindicted for statements made by him while giving testimony in his own defense at the trial under this first indictment, testimony which he was

giving solely as the result of an indictment obtained through oppression and deceit in the grand jury room and as the result of the United States Attorney's action in withholding and suppressing information which would have resulted in the quashing of that indictment prior to any testimony by petitioner.

## Statement of Facts

The issue presented to this Court is nothing less than the integrity of the grand jury system and the processes of law in the federal courts. Because of the importance of this issue and the significance of the origin and background of this prosecution, as well as petitioner's inability to print the record due to lack of funds, we feel it our duty to present the facts in considerable detail in this petition. For the convenience of the Court, we have divided these facts between what came out at the first trial and what has been learned subsequently, all of which is in the record before this Court.

### A. What Developed at the Trial Under the First Indictment

#### 1. *Bentley's Activities as a Spy*

In the latter part of 1945, Elizabeth Bentley confessed to the F. B. I. that she had been a member of the Communist Party, a member of a Russian spy ring, and the willing tool and paramour of its head man. She charged that petitioner, among many others, was a member of the Communist Party and had given her information obtained from government files, which she transmitted to Russia. *Her story,* repeated in public before an investigating committee of the United States Senate on July 30, 1948, and again in large part at the trial, is briefly as follows:

She joined the Communist Party when she was a graduate student at Columbia University in March, 1935 (R. 1045). In 1938 she was put in contact with one Jacob Golos, and began doing research work for him, believing that she was helping him collect research material for writers on the Communist publication "New Masses" (R. 1048-49, 1139-41). After about a year or more, she discovered that Golos was really a Russian spy; but by that time she had become his mistress and she continued collecting information for him even though she now knew she was herself engaged in espionage (R. 1140-42). In 1941, she began working as a courier for Golos' spying activities, obtaining information from various government employees in Washington and bringing it to Golos for transmission to Russia (R. 1056-58). In the course of these operations she came in contact with various important government employees, and particularly with a group described by her as the "Silvermaster group", who were employed in various government departments, including the Treasury and even the White House itself (R. 1149-51). This group microfilmed all kinds of highly secret documents, which she collected for Golos every two weeks (R. 1152, 1155-59); through this group she learned such top secret information as advance plans for B-29 raids (R. 1157); the date of D-Day for the invasion of Normandy (R. 1158); and the fact that the government was about to break the Russian code (R. 1158).

In addition to the Silvermaster group, she had other sources, including a number of individual contacts who gave her information (R. 1161). Among these was Remington, who had been introduced to her by Golos, and whom she described as a "minor figure", one of the "least important" of her contacts (R. 1213) who did not know the material he gave her was going to Russia (R. 1166-7).

Golos died in November, 1943 (R. 1261). Bentley asserted

that she went to the F. B. I. with her story in August, 1945, because her conscience was bothering her (R. 1169, 1289-92). But at the first trial it developed that it was less conscience that took her to the F. B. I. in August, 1945, than it was to inquire about a man whom she had recently met at the St. George Hotel in Booklyn. This became evident when the defense introduced in evidence (Ex. T) a letter from the F. B. I. to Bentley, dated October 8, 1945—almost two months after the August interview—which indicated that at that time the F. B. I. was interested solely in whether this man was impersonating an F. B. I. agent (R. 1336-9). On October 11, 1945, Louis Budenz, a Communist who had been associated with Bentley in some of her activities (R. 1296-1297), publicly announced that he had left the Party (R. 1343-4). We think it is apparent that it was not until after the Budenz revelations that Bentley began to tell the story of her own spying activities. But, be that as it may, she gave whatever information she had about herself and about Remington to the F. B. I. during the latter part of 1945 or early in 1946. No steps have ever been taken to bring Bentley to justice for her confessed crimes.

2. *The Beginning of the Remington Investigation*

On April 15, 1947, about a year and a half after Bentley's "confession", three F. B. I. agents called on Remington and interviewed him for 3½ hours (R. 3248). Thereafter there were two other interviews (R. 3246). Petitioner denied that he had ever been a member of the Communist Party or had ever given Bentley any secret information (R. 3176-3186).

In June 1947, Bentley told her story to a grand jury in New York (R. 1170). Petitioner was also called before that grand jury and testified voluntarily and at length about his relations with Bentley and matters relating thereto

(R. 2622-7, 2661-2). No indictment was returned against either Bentley or Remington or against any of the other persons publicly accused by Bentley (R. 1300-5).

### 3. *Bentley Supports Herself by Writing and Lecturing About Her Unpunished Criminal Activities*

In the spring of 1948, Bentley called upon Mr. Frederick Woltman, a prominent writer on the New York World Telegram, to find out when the grand jury to which she had told her story was going to return indictments, for she thought the grand jury had taken "a long time" (R. 1305-1316). Woltman put her in contact with Mr. Nelson Frank, also of the New York World Telegram, and she entered into a contract with Frank whereby he would be her literary assistant and would share with her the proceeds of any writings based upon her disclosures (R. 1306-9).

In July 1948, Frank wrote a series of sensational articles about Bentley for the World Telegram (R. 1309-12, Ex. S). Immediately thereafter, on July 30, 1948, she testified about her contacts with Remington before an investigating Committee of the Senate (R. 1312). A day or two after that she testified before the House Committee on Un-American Activities about many of her other espionage activities (R. 1313-5).

Since these public appearances in July, 1948, Bentley has supported herself most of the time by lecturing and writing about her experiences as a Communist spy (R. 1348-50). For the year prior to the first trial she had been engaged in writing a book on this same subject (R. 1350) in which she repeated her accusations against petitioner as well as others of her alleged spy ring (R. 1352). The book was serialized in McCall's magazine and is presently available in all bookstores. She herself referred to the book as her "livelihood" (R. 1419-20). It is apparent, therefore, that the cir-

cumstances which will now be related must have been extremely damaging to her "career" as a writer and lecturer.

### 4. *Doubt Is Cast on Bentley's Story*

Despite Bentley's statements to the F. B. I. in 1945 and to the grand jury in 1947, Remington remained continuously in government employ, rising successively from one important position to another (R. 2641-61). When Bentley, in 1948, made her public accusations against her 30 or so government contacts (R. 1313-5), Remington, with one possible exception (R. 1315), was the only one of those accused still in government service. On February 9, 1949, petitioner was publicly cleared by the Loyalty Review Board (Messrs. Seth Richardson, George Alger and Harry Colmery sitting) of loyalty charges based on Bentley's accusations and restored to his position at the Department of Commerce (R. 1355-9). His case received so much public notice that it was natural for the issue of Bentley's credibility to focus on whether she was right about Remington.

In addition to Remington's clearance by the Loyalty Review Board, an even more serious threat to Bentley's career as a lecturer and writer arose. After her public appearance before the Senate Committee in 1948, Bentley repeated her accusations against Remington in public over a television network (R. 1352-4). He promptly sued her, as well as the television network and the program sponsor, for libel (R. 1354, 1369-72). After examination before trial of Bentley and considerable investigation of the facts by the attorneys for herself and her co-defendants (R. 1391), the television network and the sponsor settled the libel suit in February, 1950, by paying Remington $9,000 (R. 1372, 1382).[3]

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[3] The preoccupation before the grand jury of both Brunini and Donegan with Remington's vindication over Bentley in the libel suit is discussed at page 26, *infra*.

This then was Bentley's situation in the spring of 1950, just before the first indictment. Despite her public charges, Remington had been cleared by the Loyalty Review Board, and was holding an important position in the Department of Commerce. A libel suit based upon Bentley's charges against Remington had been settled by her co-defendants through the payment to Remington of a substantial sum of money. Not only this, but none of her many government contacts against whom she had made charges in her public appearances before the House and Senate Committees had been indicted at that time, or, for that matter, have ever been indicted (R. 1421-3).

These three circumstances combined to place her very means of livelihood in jeopardy. How could she continue lecturing or publish a book about experiences that had been successfully challenged by Remington, and about which the Government had done nothing, unless something were done to prove Remington a liar?

In April and May of 1950, the House Committee on Un-American Activities reopened the Remington case. Bentley testified again (R. 1171) and in addition some witnesses testified to petitioner's alleged membership in the Communist Party in Knoxville, Tennessee in 1936-7 between his sophomore and junior years in college (R. 595, 706). This of course had nothing to do with Bentley's charges of spying in Washington in 1942-3, five years later. Petitioner was also examined by the House Committee in May (R. 2623), and was called before a grand jury in Washington around the same time (R. 2623). Again no indictment was returned.

This is the background upon which a grand jury in New York investigating espionage took up the Remington case later in May, 1950 (R. 2623).

### 5. *The Grand Jury Foreman Turns Out To Be Bentley's Collaborator*

During the course of the first trial in January, 1951, petitioner's counsel received a call from a Mr. Brown who stated that a friend of his had information of importance to the defense (R. 1609). Brown had first offered his information to the judge, and was referred by him to counsel (R. 1627-8). A week after the call, Brown brought his friend, a Mrs. Collins, to defense counsel (R. 1609). Mrs. Collins had until shortly before the first trial been in charge of publicity at Devin-Adair, the publishers of Bentley's book (R. 1598). Mrs. Collins was deeply troubled because she knew that during the time that Remington was appearing before the grand jury and at the time of the indictment, John Brunini, the foreman of the indicting grand jury, was collaborating with Bentley in the preparation of her book (R. 1598-1607).

This was the first intimation that the defense received about collaboration between the foreman of the grand jury and the chief prosecution witness (R. 1513, 1609) and this information became available to the defense just before Bentley took the stand (R. 1607-09, 1627-29). Defense counsel pressed Bentley about her relations with Brunini. Bentley at first denied that Brunini did any writing on her book (R. 1377), but later conceded that he went over it "the same as any editor would" (R. 1377-79). Although Bentley admitted that Brunini had given her both "morale" and "editorial" support (R. 1377-78), she denied that he had any financial interest in her book (R. 1377, 1380). Bentley was evasive, not only about her relations with Brunini, but even more so about the book itself. She did not know when the book was to be published (R. 1381), although she talked about a "deadline" (R. 1419). She did not know where the book was since it was all in "bits

and pieces" (R. 1417-9), although she several times referred to her "manuscript" (R. 1376, 1385). She would not even give the location of the book (R. 1417-21), although it was serialized shortly after the trial and has now been published in book form. She asserted that she never discussed with her publishers what the effect would be on her book if Remington was acquitted (R. 1381), although she conceded that she called Remington a Communist in the book (R. 1382).

During the course of Bentley's cross-examination, the defense produced and Bentley identified a contract between herself and Devin-Adair dated June 2, 1950 (6 days before the indictment). This contract, which was introduced in evidence by the defense (Ex. W, R. 1380), was witnessed by one Leyla Sefa (R. 1536). The defense called to the stand both Miss Sefa and Mrs. Collins. Neither Sefa nor Collins had ever met petitioner or had any interest in his acquittal (R. 1550, 1576, 1606). Indeed, the defense did not even see Sefa until the day before she appeared as a witness (R. 1563) nor Collins until a few days before she appeared (R. 1609, 1627-9).

Mrs. Collins, who was publicity director for Devin-Adair until shortly before the trial (R. 1598), testified that she first saw Bentley when Bentley came to Devin-Adair with Brunini around the middle or end of May, 1950 (R. 1599). At that time the president of Devin-Adair, Mr. Devin Garrity, introduced Bentley and Brunini to Collins as follows: "This is Elizabeth Bentley who is going to do a book for us and this is John Brunini who is helping her do it * * *" (R. 1599).

Miss Sefa had been assistant to Garrity from October, 1949 to September, 1950 (R. 1535-6). Both Sefa and Collins identified the contract (Ex. W) dated June 2, 1950 between Bentley and Devin-Adair for the publication of Bentley's book (R. Sefa, 1536; Collins, 1601). Both wit-

nesses testified that there was an earlier agreement prior to the one of June 2, 1950 under which Brunini was to be Bentley's literary assistant and receive a part of the proceeds of the book (R. Sefa, 1537-1546, 1579-82; Collins, 1600, 1610, 1611). Sefa remembered typing a contract that embodied this agreement (R. 1545-6). Collins did not see the contract but, in response to a question by the United States Attorney, she testified that Garrity and Bentley stated that it had been signed (R. 1610-11).

Miss Sefa, in response to a question by the United States Attorney, stated that Mr. Sloane, Editor of Devin-Adair, had told both her and Collins that the first contract was destroyed (R. 1594-5). Collins related that she had asked Bentley "Why was it necessary for us to destroy that contract, draw up another" and that Bentley replied, "There is really no reason why we did it. We just thought it would be the best all around; there was no reason why we had to do it" (R. 1601-3). Sefa also testified that prior to the execution of the second contract dated June 2, 1950 it was agreed that Brunini would receive compensation for his work on the book notwithstanding that this second contract did not mention him (R. 1546-50).

The testimony of the disinterested witnesses Collins and Sefa that Brunini and Bentley were collaborating on Bentley's book prior to the time of the indictment was not contradicted by any witness. The only part of the testimony of these two witnesses that was contradicted—and this only by Bentley—was the existence of the earlier contract under which Brunini had a financial interest in Bentley's book and the testimony that his financial interest survived the destruction of the earlier contract (R. 1380, 1386-8).

### 6. *The United States Attorney Withholds and Suppresses the Facts*

During the argument on the motion to dismiss the indictment, which the defense made as soon as these facts became

known during the first trial (R. 1513), United States Attorney Saypol opposed the defense motion with the categorical assurance to the trial court that there had been an "utter absence of irregularity" (R. 1519) in the grand jury proceedings and announced that the "files of the government contain a full narrative of these incidents" (R. 1526-7). The United States Attorney further stated that he had discussed these matters with the Attorney General of the United States, apparently with a view to quashing the indictment (R. 1527). Despite the fact that the matter was sufficiently serious to take up with the highest law officer of the United States Government, the United States Attorney withheld this vital information from petitioner.

What began as the withholding of vital information from the defense prior to the trial became the suppression of vital facts at the trial. The United States Attorney, although he knew the true facts, attempted to create the impression that the Collins-Sefa testimony was a fabrication. We urge the Court to read the typewritten record of that cross-examination, particularly the incident where Mrs. Collins was reduced to tears by the insistence upon a "yes" or "no" answer to what we can only describe as a trick question (R. 1615-31), and also to read the record of the proceedings on the next court day when the United States Attorney shouted to judge and jury that Collins and Sefa were "liars" (R. 1631). If there was any part of the testimony of the witnesses Sefa or Collins that was not precisely in accordance with the "full narrative" in the possession of the Government, it was the duty of the United States Attorney to state the true facts (*Berger* v. *United States,* 295 U.S. 78, 88, 89; *Griffin* v. *United States,* 183 F. 2d 990, 992-3 (App. D. C. 1950)) instead of adding to the impropriety of his original failure to inform the defense of all these facts before the trial by this attempt to prevent the defense from proving these facts at the trial.

As already indicated, the United States Attorney op-

posed the defense motion to dismiss the indictment with the categorical assurance to the trial court that there had been an "utter absence of irregularity" (R. 1519) in the grand jury proceedings. The defense asked to inspect the narrative statement of the Brunini incident but the United States Attorney indicated his opposition and the trial court denied the request (R. 1637, 3132-34). During a colloquy on this point, the United States Attorney stated that the alleged improprieties were "made of whole cloth" (R. 3134). Petitioner also moved promptly, after the Brunini incident came out in the record, to inspect all the minutes of the grand jury on this ground, among others (R. 1527). Despite the overwhelming case that was made out for the inspection, the motion was denied (R. 1527-31). The defense then moved to inspect the minutes of petitioner's testimony before the grand jury (R. 1531). This was protested vigorously by the United States Attorney (R. 1532) and denied (R. 1532, 2667).[4] Petitioner's motion to have the minutes sealed into the record was likewise vigorously protested by the United States Attorney, who referred to the grand jury improprieties as a "straw man" (R. 3127-28). The court, however, reluctantly granted petitioner's motion (R. 3126-32) and the minutes are thus a part of the record and available to this Court upon this petition.

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[4] When petitioner took the stand in his own defense, his counsel sought to bring out the prejudicial action of the foreman during the questioning of petitioner before the grand jury. Having been denied the grand jury minutes, this was the only avenue of proof open to the defense. The United States Attorney vigorously objected and the judge sustained his protest (R. 2664). The United States Attorney's objection to the defendant testifying about the foreman's role at the grand jury being sustained, the defense made an offer of proof "to show the extent to which the foreman participated in the questioning and to show the abuse of the defendant before the grand jury by the foreman, all of which could not but have influenced the vote of the grand jury" (R. 2665).

### 7. *Additional Facts Concerning the Grand Jury Improprieties Developed at the First Trial*

(i) The prosecution's case was presented to the first grand jury by Mr. Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-24). During the course of Bentley's cross-examination at the first trial, she admitted, after first naming someone else, that Donegan had been her personal attorney in 1947 when he was engaged in the private practice of law (R. 1389-90) and had assisted her in recovering $7,200 from the cover job (R. 1388) that she had while she was a spy (R. 1280-5).

(ii) One of the first witnesses called before the grand jury was Mr. Joseph A. Egan, one of Bentley's present personal counsel (R. 1391, 1496). Quite obviously, Egan could have had no personal knowledge of the facts concerning Remington's alleged espionage or his alleged membership in the Communist Party; Egan was Bentley's personal counsel during the libel suit, after the association between Bentley and Remington had long since terminated; he had assisted in the preparation of her defense to that suit—i. e., in seeking to prove that petitioner had been a member of the Communist Party (R. 1391). Consequently, Egan's testimony could only have been both incompetent and prejudicial. Petitioner's motion to inspect the minutes of Egan's testimony (R. 1533) was denied (R. 3126).

(iii) Remington himself was subpoenaed before the grand jury, and kept there for five days (R. 2664). In support of petitioner's motion to dismiss the first indictment on the ground of the aforementioned facts (R. 1513), petitioner presented an affidavit setting forth abusive and improper tactics by Brunini and Donegan in the grand jury room (R. 1515). The affidavit set forth a number of subjects on which Brunini and Donegan had interrogated Remington which were wholly unrelated either to espionage or Com-

munist Party membership, but were directly related to the public dispute between Bentley and Remington. Examples of such irrelevant subjects were what Remington's investigators during the libel suit uncovered about Bentley. Who was financing Remington's defense? Whether he knew certain reporters who had written favorable stories about petitioner and unfavorable stories about Bentley? Why hadn't he resigned from the Government? (R. 1515-16). What had these subjects to do with espionage—the only matter which the special grand jury was impanelled to investigate? Obviously, their only purpose was to aid in the campaign to rehabilitate Bentley.

(iv) Finally, when he was indicted, it was not for espionage, nor for any crime committed before he was called before the grand jury. During the course of his five days of cross-examination by Brunini and Donegan, he was asked the crucial question upon the answer to which the rehabilitation of Bentley's credibility depended: "At any time have you ever been a member of the Communist Party?" On June 8, 1950 he was indicted for perjury for swearing that he had not.

### B. Proceedings Subsequent to the Trial Under the First Indictment

#### 1. *Petitioner's Appeal and Reindictment*

Petitioner's motions at the trial to dismiss the first indictment and to inspect the grand jury minutes all having been denied, petitioner was convicted under the first indictment on February 7, 1951 and given the maximum sentence of five years in jail and $2,000 fine (R. lxvii). On August 22, 1951, the Court of Appeals unanimously reversed the conviction on the ground that the judge's charge to the jury concerning membership in the Communist Party was

erroneous and also found other errors in the judge's action and in the conduct of the United States Attorney. 191 F. 2d 246. The court, however, refused petitioner's request that the indictment should be quashed because of the improprieties in the grand jury room which have just been related. 191 F. 2d 246, 252.

On September 20, 1951, petitioner applied to Mr. Justice Jackson for a thirty-day extension of time within which to file a petition for certiorari predicated upon the facts already related concerning the grand jury proceedings and the extension was granted the same day. On October 19, 1951, petitioner filed his petition for certiorari in this Court. On October 25, 1951, 35 days after the Government learned of petitioner's intention to apply to this Court for a writ of certiorari and 6 days after he actually filed his petition, petitioner was reindicted. This new indictment charged that at his trial under the first indictment petitioner had testified falsely in 5 particulars, namely, in denying (I) that he ever knowingly attended Communist Party meetings, (II) that he had given information to Bentley to which she "was not entitled", (III) that he had ever paid Communist Party dues, (IV) that he ever asked anyone to join the Communist Party, and (V) that he had any knowledge of the existence of the Young Communist League at Dartmouth College, where he had been a student from 1934 to 1939 (S. I-VI). The reindictment, it has already been noted, failed to include a count covering the initial charge for denying past membership in the Communist Party.

Petitioner pleaded not guilty to the reindictment on October 30, 1951 (S. VIII). On November 2, 1951, the Government filed a motion in this Court "for leave to apply to the District Court for leave to dismiss" the first indictment, stating that "under the new indictment, there is no question as to the propriety of the conduct of any of the grand

jurors" in procuring the first indictment and that "the Government does not intend to press the charge" that petitioner had lied when he denied that he had ever been a member of the Communist Party (p. 3).[5] Petitioner opposed the Government's motion on the ground, among others, that the dismissal would prevent an adjudication by this Court of the unconstitutional conduct of the first grand jury and of the United States Attorney which vitally affect the validity of the reindictment. On December 11, 1951, this Court unanimously denied the Government's motion. 342 U. S. 895.

On January 11, 1952, the Government filed its opposition to the petition for certiorari, repeating its intention to dismiss the first indictment and contending that a decision by this Court on the first indictment would be "advisory" only, since, whatever the decision of this Court upon the petition from the first indictment, the Government intended to retry petitioner under the reindictment and require him to raise the invalidity of the reindictment on appeal from any conviction under that reindictment. *Brief for the United States in Opposition*, p. 23; *Memorandum for the United States in Reply to Petitioner's Response to the*

[5] The Government's reindictment of petitioner for statements other than the one on which the first trial was predicated and the Government's statements to this Court that they did "not intend to press the [original] charge" was tantamount to a concession that the initial charge could not be proven. The allegedly false statements charged in both the first and second indictments were all closely related and petitioner made all these same denials when he was called before the grand jury which returned the first indictment. *cf. State* v. *Shannon*, 136 Me. 127, 3 A. (2d) 899 (1939); *United States* v. *Emspak*, 95 F. Supp. 1012 (D.D.C. 1951). If the Government can choose one of several related items as the basis of a perjury indictment and then, finding that they cannot prove this item, go on to other related items as the basis of a second perjury indictment, they have found an engine of harassment which makes the double jeopardy guarantee of the Constitution of little significance. This point, however, was not raised before or at the second trial and we have reluctantly concluded that it cannot be raised here (*Federal Rules of Criminal Procedure*, 12(b)(2)), unless this Court should desire to consider the question on its own motion.

*Government's Motion for Leave to Apply to the District Court for Leave to Dismiss the Indictment*, p. 15. On March 24, 1952, this Court denied the petition for certiorari. 343 U. S. 907. Mr. Justice Black and Mr. Justice Douglas dissented, Mr. Justice Frankfurter indicated additional views and Mr. Justice Clark did not participate.

2. *Petitioner's Motion to Dismiss and the Second Trial*

On May 5, 1952, petitioner moved in the District Court to dismiss both the first and second indictments because they violated the fundamental principles of justice and due process of law and, in the alternative, requested an inspection of the minutes of petitioner's testimony before the first grand jury as ordered by the Court of Appeals and "a hearing to determine whether the foreman of the Grand Jury exercised undue influence in the procurement of the first indictment; and whether the Government concealed from the defendant the relationship between the foreman of the Grand Jury and the chief witness for the prosecution, and the foreman's exercise of undue influence" (S. XX-XXI). The motion was expressly based upon the entire proceedings under the first indictment and upon the affidavit of William C. Chanler, defense counsel at the first trial, summarizing the facts concerning the Brunini-Bentley relationship (S. XXIa-XXIe). The Government filed no answering affidavit. Nevertheless, on June 30, 1952, Judge McGohey denied the motion to dismiss the two pending indictments or, in the alternative, to conduct an inquiry into the grand jury's actions "on the authority of U. S. v. Williams, 341 U. S. 58, and U. S. v. Remington, 2 Cir., 191 F. 2d 246" (S. XXII).

At the opening of the trial under the reindictment and again at its conclusion, petitioner's counsel unsuccessfully renewed his motion to dismiss the indictment (S. 3-8, 899). Petitioner was tried and convicted of the charges of falsely

denying that he had any knowledge of the existence of the Young Communist League at Dartmouth College, where he had been a student from 1934 to 1939, and that he had ever given any information to Bentley to which she "was not entitled" (S. 1111).[6] He was acquitted of the charge of falsely denying he had ever asked anyone to join the Communist Party (S. 1111) and the jury was unable to agree on the counts concerning his denials that he had ever knowingly attended Communist Party meetings or that he had ever paid Communist Party dues (S. 1112). Petitioner was sentenced to three years in the penitentiary on each of the two counts on which he was convicted, the two sentences to run concurrently (S. 1140).

### 3. *What Actually Happened Before the First Grand Jury*

During the trial on the reindictment, the minutes of petitioner's and Ann Remington's testimony before the first grand jury were made available to petitioner's counsel for

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[6] Petitioner believes that his motion (S. X) to dismiss as immaterial the count relating to his "knowledge" of the YCL at Dartmouth College in the 1930s should have been granted, since the trial judge at the first trial had ruled that evidence of membership in the YCL was immaterial to the issue before him of membership in the Communist Party (R. 987, 988, 989, 3732, 3739, 3801, 4017). The failure to dismiss this count was particularly damaging to petitioner's defense on the other counts because of the ease with which the Government was able to establish "knowledge" in the generally accepted meaning of that term and petitioner's difficulty in explaining his own position that the word "knowledge" meant to him first-hand knowledge, not hearsay knowledge. The Government's evidence on this immaterial count should be contrasted with its evidence on the only other count on which the Government was able to obtain a conviction—for his denial that he had given Bentley information (which he admitted) to which she "was not entitled" (which he denied). On this latter count the Government produced only an ex-wife who had been coerced and deceived in the grand jury room and a confessed ex-spy who was herself instrumental in obtaining the prosecution. Nevertheless, petitioner is not relying on this ground, for, "as the sentences on both counts could lawfully have been imposed upon either, and are the same, and are to run concurrently, the conviction upon either, if without error, would alone sustain the judgment and require its affirmance." *United States* v. *Hiss*, 185 F. 2d 822, 831 (CA 2, 1950), certiorari denied, 340 U. S. 948.

the purpose of direct and cross-examination, respectively (S. 832-853; 146); the minutes were thereafter returned to the Government. After petitioner's present counsel agreed to handle the appeal, they requested the minutes from the Government, but their request was refused (S. XLIII). Thereupon on May 25, 1953, petitioner moved for an order directing the United States Attorney to deliver to petitioner's counsel the testimony of petitioner and of Ann Remington before the grand jury for counsel's use in the preparation of petitioner's brief before the Court of Appeals on the ground that, the veil of secrecy having been broken, there was no valid reason for refusing petitioner's counsel the papers needed to prepare a brief for the Court of Appeals. Judge Leibell granted petitioner's motion from the bench (S. LXXXIII). On June 5, 1953, Judge Leibell entered an order directing that the minutes be made available to petitioner's counsel, but only "at the office of the United States District Attorney" and provided that "counsel shall not quote from such testimony in their briefs but may refer to certain pages of the said testimony" (S. XCII). Petitioner's efforts to obtain a modification of these limitations were unsuccessful (S. XCVII-XCVIII), and this petition, like the brief in the court below, is being written under those limitations.

The minutes of Ann Remington's testimony show that she told the first grand jury substantially the same story concerning her own and her husband's activities and beliefs concerning Communism and the Communist Party that petitioner has consistently maintained through six years of questioning. She testified that she and petitioner started off as persons interested in the American Student Union, Loyalist Spain and labor unions (GJ. 7784),[7] who were

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[7] Wherever the designation "GJ." is used, it refers to the page number of the minutes of the first grand jury which are a part of the record on this petition.

sympathetic to Communism (GJ. 7764, 7785, 7786). She steadfastly maintained that they had never been members of the Communist Party (GJ. 7747, 7748, 7754, 7761, 7766, 7767, 7783, 7793) and even related that they had had the usual disillusioning experience of persons sympathetic with Communism in the 1930s when the Nazi-Soviet Pact and the Russo-Finnish war came along (GJ. 7764)—two years, incidentally, before they met Bentley. Foreman Brunini's efforts to get Mrs. Remington to change her testimony by poisoning her mind with alleged lies Remington had told about her and her mother (GJ. 7766, 7806) and by implications that he was spending his money on a libel suit against Bentley instead of supporting her (GJ. 7775-7776) were unsuccessful and Mrs. Remington stuck to her earlier answers through the continuous grilling (GJ. 7741-7826), flattery (GJ. 7795), and threats of perjury (GJ. 7761, 7803). After hours of grilling—it was now about 3 o'clock in the afternoon (GJ. 7830)—Mrs. Remington stated that she was getting fuzzy and incoherent (GJ. 7820) because she hadn't eaten for such a long time (GJ. 7820), apparently having flown up from Washington in an airplane early that morning (GJ. 7830). She repeatedly referred to her hunger and need for something to eat (GJ. 7825, 7826). At this stage, fuzzy and denied food, she asked whether hunger was being used on her as a third degree weapon (GJ. 7825). Foreman Brunini's response to this and to Mrs. Remington's repeated request for something to eat was that the grand jury hadn't shown its teeth as yet (GJ. 7827). At this point, the foreman stated categorically that Ann Remington had no privilege to refuse to answer any question [8] and threatened her with

[8] Prosecutor Donegan, who had made the usual formal statement concerning the obviously relevant privilege against self-incrimination at the opening of the grand jury hearing of Mrs. Remington (GJ. 7741-7742), stood silently by while foreman Brunini forced an answer from the witness by misstating the law both on her privilege against self-incrimina-

jail if she did refuse to answer (GJ. 7827). Ann Remington thereupon reversed her testimony and gave Brunini and Donegan the answer they had been seeking for hours and the corroboration necessary for the purpose of rehabilitating Bentley and indicting petitioner.[9] A minute later, at 3:16 p. m. (GJ. 7830), she was allowed to eat (GJ. 7830). Foreman Brunini's guilty conscience became evident later in the day when he asked the witness if she felt they had tried to starve her out (GJ. 7845). Despite the fact that Mrs. Remington at this time was "cooperating" fully with Brunini and Donegan, she indicated clearly that the answer she had given at their urging had been the result of hunger (GJ. 7845).

If the facts already related could leave any possible doubt that Brunini was representing Bentley in the grand jury room, the Court's attention is respectfully invited to pages 7806 through 7809 of the grand jury minutes. There Brunini says that it is not Remington himself who is important; that he is a very minor figure in Bentley's story of her espionage activities, but he has become extraordinarily important because he has chosen to talk and to fight back at Bentley. There, too, Brunini lectures Mrs. Remington (and the other grand jurors) that it is extremely im-

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tion and her privilege in so far as confidential communications between husband and wife are concerned.

For a more graphic account of this Brunini-Donegan "oppression and deceit", the Court is referred to Judge Learned Hand's dissenting opinion (pp. 51 to 57 *infra*, where, uninhited by the district court's order that petitioner's counsel not quote from the minutes, Judge Hand relates this shocking incident in detail.

[9] It is quite apparent from the record that the testimony which Brunini and Donegan thus finally wrung from Mrs. Remington supplied the corroboration necessary for the purpose of rehabilitating Bentley and indicting petitioner. Not only had two previous grand juries failed to indict without that testimony, but Mrs. Remington was the only witness at either the first or second trial who corroborated any part of Bentley's story. We are confident that an examination of the minutes of the grand jury would disclose that this was also the case there.

portant for the American people to be awakened to the dangers that have been related by the ex-Communists, such as Bentley, who have come forward and told their stories, but who have been smeared by persons such as Remington.[10]

In their five-day examination of Remington, both Brunini and Donegan likewise demonstrated their preoccupation with the rehabilitation of Bentley. Again and again they came back to the question of Remington's libel suit against Bentley and demanded to know why he thought the $9,000 settlement was a "vindication" in his struggle against Bentley (GJ. 8107-09, 8222, 8223-25, 8225-27, 8337-38, 8339, 8340-41, 8342-44). They asked him about his relations with Daniel Lang (GJ. 8227, 8330) and Alan Barth (GJ. 8227) who had written pieces in the New Yorker and the Washington Post siding with Remington in his battle against Bentley. They asked who was financing his fight against Bentley (GJ. 8226), who was paying his investigator, Mr. Bielaski, (GJ. 8324), whether the American Civil Liberties Union was paying anything (GJ. 8324), and what Bielaski had found out about Bentley (GJ. 8326, 8334). They asked what Remington's own lawyers had told him about Bentley (R. 8326) and denied the relevance of the attorney-client privilege before the grand jury (GJ. 7993). Foreman Brunini even went so far as to suggest that Professor Macmahon of Columbia, who had given an affidavit for Remington in his fight for loyalty clearance against Bentley's charges, was a Communist (GJ. 8355-56). On an even lower level, he was asked irrelevant questions concerning his divorce (GJ. 8050-51, 8344-46), whether he had ever struck his wife (GJ. 8347-48), whether he had ever committed adultery

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[10] Brunini's statement indicating that Remington was an extremely important figure solely because he had chosen to talk back to Bentley may help explain the previously unexplained fact that none of the other persons accused by Bentley have ever been indicted, only the one she described as an unimportant "minor figure" (R. 1213).

(GJ. 8347-48), whether he had ever had psychiatric treatment (GJ. 8227), whether he had sought to avoid combat service during the war (GJ. 8059), and whether he had ever shared the same bed with a male roommate (GJ. 8283).

It should be noted, in concluding petitioner's Statement of Facts, that this showing of the purpose of Brunini and Donegan to rehabilitate Bentley and of their deceitful and abusive conduct in the grand jury room in carrying out that purpose has been made through only a part of the grand jury minutes. The remainder of the grand jury minutes, including the testimony of the witness Egan, Bentley's lawyer in the libel suit, have never been and are not now available to petitioner. Nor would even all the minutes necessarily reflect the entire improper conduct which may have occurred outside the grand jury room or during recesses and off-the-record discussions in the grand jury room.

We venture one further observation on the facts. Petitioner had appeared before a federal grand jury in the Southern District of New York in 1947 and had not been indicted. He had appeared early in May, 1950 before a federal grand jury in the District of Columbia and had not been indicted. There was no apparent reason for his being called before another grand jury in New York the same month. We ask the Court to examine the minutes of this grand jury at the point where the Remington case was first discussed and to determine this matter for itself. We confidently believe that the minutes will either show that the grand jury took up the Remington case at the direct request of Brunini or Donegan or will indicate this fact through silence. In view of the preoccupation of Brunini and Donegan with the rehabilitation of Bentley, as shown in the limited minutes of the grand jury that petitioner has been allowed to see, it does not seem to be stretching inferences too far to assume that Remington was only summoned to

New York before the grand jury which returned the initial indictment for the purpose of rehabilitating Bentley.

4. *The Decision of the Court Below* (Appendix B, pp. 45 to 59, *infra*)

Armed at last with a part of the minutes of the first grand jury, petitioner predicated his appeal to the court below upon the single ground that his reindictment for statements made by him while giving testimony in his own defense under the first indictment, testimony which he was giving solely as a result of an indictment obtained through unlawful conduct in the grand jury room practiced by agents of the chief prosecution witness and as a result of the United States Attorney's misconduct in withholding and suppressing information concerning these grand jury improprieties, is a violation of those "civilized standards of procedure" applicable in the federal courts and of due process of law. Judge Augustus Hand and Judge Swan rejected petitioner's contention and affirmed his conviction. The majority judges recognized that the decision of this Court in *United States* v. *Williams*, 341 U. S. 58, upon which the Government placed its primary reliance, was "distinguishable since here [in the *Remington* case] the previous indictment and trial is attacked because of government misconduct", but they held that the Government wrong does "not permit the defendant to commit a new and independent crime." Judge Learned Hand, in dissenting, related in detail the "oppression and deceit" practiced upon Ann Remington by Brunini and Donegan "in procuring the indictment" and held that this alone, without consideration of other irregularities asserted by petitioner, made the first indictment subject to quashing. "It was to escape this risk," said Judge Hand, "that that indictment was abandoned; but I do not believe that by this device [the reindictment] a prosecution should

escape the consequences of its wrong. For that conclusion I rely upon the doctrines laid down in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Sorrells* v. *United States,* 287 U. S. 435, both of which, though challenged at the time, have now fully established themselves as a part of federal criminal law."

## Specifications of Error

The majority of the Court of Appeals erred:

(1) In failing to hold that petitioner was deprived of due process of law.

(2) In failing to apply the doctrines laid down by this Court in the *Silverthorne* and *Sorrells* cases.

(3) In failing to hold that the maintenance of the integrity of the grand jury system and of the processes of law require the dismissal of the reindictment.

(4) In failing to dismiss the reindictment.

## Reason for Granting the Writ

THE DECISION OF THE MAJORITY OF THE COURT OF APPEALS REFUSING TO DISMISS THE REINDICTMENT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AND RAISES IMPORTANT QUESTIONS OF FEDERAL LAW INVOLVING THE INTEGRITY OF THE JUDICIAL PROCESS WHICH SHOULD BE SETTLED BY THIS COURT.

### I

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." *Constitution, Amendment V.* The purpose of this amendment was to insure that no one shall be subjected to a federal trial "unless there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers* v. *Henkel,* 194 U. S. 73, 84. Here, foreman Brunini, the

financial and literary collaborator of chief prosecution witness Bentley, and prosecutor Donegan, her former personal attorney, engaged in oppression and deceit in procuring the first indictment. Their relationship to the chief prosecuting witness, whose public rehabilitation depended upon their success in obtaining an indictment, and their unlawful conduct in achieving that end, transformed the grand jury from an impartial and responsible tribunal into an irresponsible vehicle of private enmity and malice. *Ex Parte Bain,* 121 U. S. 1, 11 (Mr. Justice Field's charge); *The United States* v. *Farrington,* 5 Fed. 343 (N. D. N. Y., 1881); *United States* v. *Kilpatrick,* 16 Fed. 765, 771 (W. D. N. C., 1883) *United States* v. *Wells,* 163 Fed. 313, 324-5 (D. Idaho, 1908); *United States* v. *Rubin,* 218 Fed. 245, 247-9 (D. Conn., 1914).

The irresponsible nature of the first grand jury and the unlawful conduct of Brunini and Donegan voided the first indictment without regard to further proof of actual prejudice to petitioner, for "the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideals reflected in the processes of our courts." *Ballard* v. *United States,* 329 U. S. 187, 195. It is the likelihood of prejudice from the irresponsible nature of the grand jury rather than any actual prejudice which is determinative. *Akins* v. *Texas,* 325 U. S. 398, 403-404; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 225; *Cassell* v. *Texas,* 339 U. S. 282, 283; *Tumey* v. *Ohio,* 273 U. S. 510; *Glasser* v. *United States,* 315 U. S. 60, 75-76.

## II

Here, however, there was actual prejudice to petitioner—prejudice not only in the procurement of the first indictment, but prejudice that carried through the entire pro-

ceeding. The prejudice in the procurement of the first indictment has already been indicated in the Statement of Facts (pp. 23 to 28, *supra*). What could be more prejudicial than Brunini's inflammatory speech to the grand jury that Remington had become extraordinarily important because he had chosen to talk and to fight back at Bentley, and that it is extremely important for the American people to be awakened to the dangers that have been related by the ex-Communists, such as Bentley, who have come forward and told their stories but have been smeared by persons such as Remington (GJ. 7806-7809)? What could be more prejudicial than the five-day examination of Remington on subjects totally unrelated to espionage or Communism, but related directly to his private battle with Bentley? What could be more prejudicial than Brunini's indicating to the grand jury that Arthur W. Macmahon, a distinguished Columbia professor who had given an affidavit for Remington in his fight for loyalty clearance against Bentley's charges, was a Communist (GJ. 8355-56)? What could be more prejudicial than irrelevant questions concerning petitioner's divorce (GJ. 8050-51, 8344-46), whether he had ever struck his wife (GJ. 8347-48), whether he had ever committed adultery (GJ. 8347-48), whether he had ever had psychiatric treatment (GJ. 8227), whether he had sought to avoid combat service during the war (GJ. 8059), and whether he had ever shared the same bed with a male roommate (GJ. 8283)? What, above all, could be more prejudicial than the oppression and deceit practiced upon Ann Remington to extract from her the necessary corroboration for Bentley?

It is this last, this forcing of corroboration for Bentley from Ann Remington's lips, that prejudiced Remington, not only before the grand jury, but throughout the entire proceedings against him. In his dissenting opinion, Judge

Learned Hand, after drawing an analogy between grand jury and star chamber proceedings and pointing to the danger that the former, like the latter, might become a tool of tyranny, adds:

> "The notion that evidence forced from a witness shall not be used originally depended, or was said to depend, upon the likelihood that it might be false."

We submit that it is impossible to read the record without coming to the conclusion that there is a very strong likelihood that the evils referred to by Judge Learned Hand were in fact present here.

When we compare Ann Remington's testimony during the hours of her resistance before the grand jury with her later testimony before that body and on cross-examination at the first trial, we submit that there is a very real likelihood that the answers that were finally wrung from her were in fact false. Throughout her testimony before she was broken down, Mrs. Remington insisted that they had never been members of the Communist Party (GJ. 7747, 7748, 7754, 7761, 7766, 7767, 7783, 7793) and that her husband could not have been a member without her knowing it (GJ. 7747, 7766). When asked how she would have known, she answered that as she understood membership in the Party, members have to go to meetings and do all kinds of dismal work (GJ. 7766) that they did not do (GJ. 7754, 7766, 7768). She added that Communists were unpleasant and very dogmatic, and that that was probably the reason she and her husband never got closer than "fellow travelers" (GJ. 7754). At pages 7783-4 of the grand jury minutes she said she was sure her husband was not a member of the Party because he did not believe in many of the things that the Party believed in.

But Brunini and Donegan would have none of it. Bentley

had publicly charged that Remington had been a Communist and they used every means to compel her to agree with Bentley. Brunini repeatedly poisoned her mind, reminding her of alleged lies which her former husband told a Senate Committee about her and her mother (GJ. 7766, 7806). That these tactics were effective is apparent from Mrs. Remington's admission at the first trial that she changed her testimony before the grand jury because her attention was called to lies that he had told about her and her mother (R. 432-3; 456-7). Brunini lectured her at length on the public importance of vindicating people like Bentley who had been smeared (GJ. 7806-7809). Finally, after hours of this pressure, misled and deceived about her legal rights, weakened by hunger and unable to resist further,[11] she gave them the answer they had been seeking: she and her husband had been Communists. Once Brunini and Donegan had wrung from her the answer for which they had worked for hours, there was no turning back for Ann Remington. From then on she was the docile witness ready to corroborate Bentley on all points. Mrs. Remington, having given this crucial statement corroborating Bentley and adverse to her husband, could not later, and cannot now, reverse herself except at the expense of becoming a confessed perjurer. The earlier perjury which she committed defending her husband—if she is now telling the truth—is of no matter. Her cooperation with the Government which uses her testimony against petitioner assures her she has nothing to fear.

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[11] Unfortunately Mrs. Remington had required care by a psychiatrist twice a week for approximately five years (R. 449-50). When this fact is considered in the light of the further fact that she had just been through a marital controversy with her husband, it is surprising that she withstood the pressure to give testimony that would be injurious to her husband as long as she did.

## III

The oppression and deceit of Brunini and Donegan, which invalidated the first indictment, was sufficient in and of itself to convince Judge Learned Hand, in view of the direct causal relationship between the first indictment and the reindictment, that the latter must be dismissed under the doctrine of the *Silverthorne,* and presumably the *Nardone,* cases. We respectfully call the Court's attention to the fact that the unlawful conduct of the Government, upon which petitioner relies for the dismissal of the reindictment, goes far beyond the actions of the foreman and prosecutor before the first grand jury. It involves the continuing false representations of the United States Attorney at the first trial before, during, and after petitioner gave the testimony upon which the reindictment is based.

As related in the Statement of Facts (pp. 14 to 16, *supra*), when the defense during the trial finally learned of the collaboration of Brunini and Bentley, United States Attorney Saypol announced in open Court "that the files of the Government contained a full narrative of these incidents" (R. 1526-27), and that he had discussed these matters with the Attorney General, apparently with a view to quashing the indictment (R. 1527). Despite the fact that the matter was sufficiently serious to take up with the highest law officer of the United States Government, the United States Attorney withheld from petitioner the information that would have made possible the quashing of the indictment.

Withholding of information prior to the trial was followed by suppression at the trial when the defense learned of the Bentley-Brunini relationship from other sources. Immediately the United States Attorney attempted to create the impression that the grand jury improprieties were some sort of defense fabrication when, in fact, he knew

not only that the Bentley-Brunini relationship existed, but also that the grand jury minutes, which he opposed the defense examining (R. 1532), showed the unlawful conduct of Brunini and Donegan before the grand jury. When defense counsel moved to dismiss the indictment on the basis of the grand jury irregularities, the United States Attorney assured the trial court that there was an *"utter absence of irregularity"* (R. 1519). When petitioner sought to inspect the full narrative of the Brunini incident in the Government's possession, the United States Attorney assured the Court that the charges of grand jury improprieties were *"made of whole cloth"* (R. 3134). When the defense sought to have the grand jury minutes, to which the defense had been denied access (R. 1527-31), sealed into the record, the United States Attorney referred to the grand jury improprieties as a *"straw man"* (R. 3128). We repeat here our request that the Court read the typewritten record of that part of the first trial covering the cross-examination of the two wholly disinterested witnesses, Collins and Sefa, who were called by the defense to testify as to the Bentley-Brunini relationship (R. 1615-37) and particularly the incident where Mrs. Collins was reduced to tears by the United States Attorney's insistence upon a "yes" or "no" answer to what can only be described as a trick question (R. 1615-31). We also urge the Court to read the record of the proceedings on the next court day when the United States Attorney shouted to the jury that Collins and Sefa were "liars" (R. 1631).

Petitioner was on the witness stand at the first trial solely because the United States Attorney violated the tenets of his office and the Constitution of the United States.[12] The

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[12] This Court has held that the Government's suppression of evidence favorable to a defendant is a deprivation of due process of law. *Pyle* v. *Kansas*, 317 U. S. 213, 215-216; *cf. Mooney* v. *Holohan*, 294 U. S. 103. The withholding of information by the United States Attorney is equally

Government, in its reindictment, is seeking to prosecute petitioner for statements petitioner made on the stand at the very time that the United States Attorney, who was questioning him, was depriving him of due process of law. The questions asked of petitioner, just like knowledge illegally gained, "by the Government's own wrong cannot be used by it . . ." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; *Nardone* v. *United States,* 308 U. S. 338, 341. Indeed here the alleged crime would never have been committed except for the "Government's own wrong." Because petitioner was being deprived of due process of law at the very time the questions which form the basis of the reindictment were asked, and because the Government is seeking through the reindictment to take advantage of its own wrong, it is submitted that the *Silverthorne* and *Nardone* cases are clearly applicable and that the reindictment should be dismissed.

The majority opinion below rejected the applicability of the *Nardone* and *Silverthorne* cases, stating: "Here we have a separate crime of perjury committed after the illegal conduct by the government as opposed to the above cases where we had only a rule of evidence developed to prevent the government from making use of its illegally procured knowledge." The majority opinion, we believe, was overlooking the illegal conduct of United States Attorney Saypol in withholding and suppressing evidence that would have resulted in the quashing of the first indictment—illegal conduct which continued right through the testimony of the petitioner upon which the reindictment is predicated. Saypol's actions towards the witnesses Collins and Sefa (R.

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a violation of due process, *United States* v. *Baldi,* 195 F. 2d 815, 820 (CA 3, 1952), certiorari denied 345 U. S. 904; *United States* v. *Ragen,* 86 F. Supp. 382 (N.D. Ill., 1949) and of those "civilized standards of procedure" which Federal courts are zealous to protect. *McNabb* v. *United States,* 318 U. S. 332, 340.

1615-31) and his representations to the trial court that there had been an "utter absence of irregularity" (R. 1519) in the grand jury room, that the charges of grand jury improprieties were "made of whole cloth" (R. 3134) and that the grand jury improprieties were a "straw man" (R. 3127-28), occurred both before and after petitioner's testimony and constituted a continuing and false representation throughout petitioner's testimony that Brunini and Bentley had no connection and that there had been no unlawful conduct by Brunini and Donegan in the grand jury room. And, all apart from the continuing illegal conduct of the United States Attorney at the very time petitioner was testifying, the majority's distinction of the *Nardone* and *Silverthorne* cases on the ground that "here we have a separate crime of perjury committed after the illegal conduct by the government" would not appear to be well taken, for, as Judge Learned Hand stated in his dissent:

> "The doctrine of the first of these [the *Silverthorne* case]—that the prosecution may not use evidence that it has unlawfully obtained— must depend, I suggest, upon the premise that the gathering of evidence is a step in the procedure for the punishment of crime; and that to gather it unlawfully is as much a denial of a part of that procedure as would be the denial of any formally prescribed step. Now the finding of the first indictment was a necessary part of the evidence in the case at bar, because without it nothing that Remington said in the first trial would have been perjury, no matter how false it was. I do not see any difference in principle between obtaining the first indictment by the unlawful extraction of evidence, necessary to its support, and obtaining a document by an unreasonable search. Surely this would not be denied in an extreme situation: as, for example, if the prosecution had suborned the witness, or threatened to prosecute them, if they did not swear as directed."

## IV

Judge Learned Hand also held in his dissenting opinion that the doctrine of entrapment enunciated by this Court in the *Sorrells* case applied to the case at bar, stating that "the question comes down to whether there is any difference between the repugnance that decent people would feel at punishing a man for perjury that the officials or their agents persuaded him to commit, and the repugnance they would feel if the officials induced him to perjure himself by securing an indictment for perjury against him by illegal means, when they knew he must inevitably repeat the perjury in his defence." Actually, there are serious elements of entrapment in petitioner's case in addition to those suggested by Judge Hand's dissent.

In May of 1950 Remington was in a two-year-old public dispute with Bentley over the question whether he had ever been a Communist. He had defeated her publicly in 1949 when he was cleared by the Loyalty Review Board (R. 1355-9). He had defeated her publicly in February, 1950, when he had obtained a substantial payment in settlement of a libel suit predicated upon her statement that he was a Communist (R. 1372, 1382). He had already been called before two grand juries and not indicted. He is then, in May of 1950, called before a third grand jury, whose foreman is Bentley's collaborator and whose prosecutor is Bentley's former personal attorney. The foreman and the prosecutor engage in oppression and deceit in procuring an indictment against petitioner, not for any crime committed outside the grand jury room, but for his answer in that grand jury room to the question involved in his public dispute with Bentley, a question put to him by Bentley's collaborators within the grand jury room. United States Attorney Saypol learns of all this; yet, not only does he fail in his duty to inform the defense of what transpired, but

he misrepresents the truth when the defense, during the trial, finally gets some inkling of what had gone on in the grand jury room. When the United States Attorney's misrepresentations prevent the dismissal of the indictment, petitioner takes the stand.[13] When it appears, during the pendency of the petition for certiorari, that this Court might act to review and dismiss the first indictment, petitioner is reindicted for what he said in his own defense in the court room.

We submit that the situation here is, in point of fact, far worse than that in the *Sorrells* case. There it was a lowly prohibition agent who sought to induce his victim to commit the crime of selling him some whiskey (287 U. S. 435-439). Here, three highly-placed officials—the foreman of a special grand jury investigating subversive activities, a Special Assistant to the Attorney General acting as prosecutor before that grand jury, and the United States Attorney himself—engaged in a series of acts, all in violation of law and of their sworn duty, to bring about in the grand jury and court rooms the testimony which forms the basis of the reindictment under which petitioner has been convicted.

## V

The Government placed primary reliance in the court below upon *United States* v. *Williams*, 341 U. S. 58. There the defendants were indicted for perjury committed at their

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[13] The majority of the court below seem to suggest that defendant should have attacked the indictment for illegality instead of taking the stand. But the defendant did, as we have shown, attack the indictment for illegality. Once his attack was overruled as a result of the misrepresentation and misconduct of the United States Attorney, there was no alternative but to take the stand. As Judge Learned Hand said: "Having committed himself upon the grand jury proceeding to a denial of his membership in the Communist Party, Remington at the trial of the indictment based upon that denial, could not escape repeating what he had said, for, if he did not take the stand, it would have been equivalent to a plea of guilty."

trial under an indictment later held invalid because charging an offense beyond the terms of the federal statute (18 U. S. C. § 241) under which it was brought. The district judge dismissed the perjury indictment on the ground that the court before whom the alleged perjury had been committed had been without jurisdiction of the substantive offense being tried. This Court reversed this action, two Justices dissenting, on the ground that the judge before whom the alleged perjury had been committed did have jurisdiction even though the facts stated in the indictment under which the court was proceeding did not constitute a federal crime. Mr. Justice Reed, writing for the majority of the Court, after pointing out that in this field "the line is narrow and often wavering" and that the policy of federal law is "to keep the course of justice free from the pollution of perjury," went on to look for, but did not find, any contravening considerations to rebut that policy in the facts before him. 341 U. S. 58, 68.

In the case at bar, the situation is totally different. Here there was gross misconduct by high government officials, not mere legal error as in the *Williams* case. Here there are the most compelling considerations of policy absent in the *Williams* case, but present in the *Silverthorne* and *Nardone* cases. Here there is at stake the integrity of the grand jury system and prevention of governmental misconduct both before the grand jury and in withholding and suppressing the facts about that misconduct.[14]

## VI

The issue presented to this Court is much broader than the guilt or innocence, or the fair or harsh treatment, of

[14] Significantly, the majority below expressly recognized that "the instant case is distinguishable [from the *Williams* case] since here the previous indictment and trial is attacked because of government misconduct." The dissenting opinion refers to the *Williams* case as "irrelevant".

one man. Cf. *Ballard* v. *United States*, 329 U. S. 187, 195; *Rochin* v. *California*, 342 U. S. 165. It involves nothing less than the very integrity of the judicial process. Petitioner is already in the penitentiary serving his sentence, as this was the only condition upon which the Government would give counsel time to prepare their appeal. Petitioner can never recapture the past six years regardless of the outcome of this petition, nor will he ever be able to remove the stigma Brunini and Donegan have placed upon him. But this Court must decide whether the institution of the grand jury is to remain as a historical protection of the individual or whether it can be transformed into a tyrannical vehicle of private malice. This Court must decide, too, whether the illegal conduct of foreman Brunini and prosecutor Donegan in procuring the indictment and of United States Attorney Saypol in withholding and suppressing the facts concerning the method of procurement of that indictment, is to be condoned as acceptable practice in the federal courts.[15] There is no way of vindicating the integrity of the judicial process other than through a reversal of petitioner's conviction and a dismissal of the reindictment.

## Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

It is further respectfully submitted that, in view of the fact that petitioner is already in the penitentiary, if this

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[15] The suggestion of the majority below that a reversal here would serve no purpose in preventing future misconduct because it "cannot be conceived that the government would deliberately procure a false indictment in the hope of later obtaining perjurious statements at the trial" overlooks the effect that such a reversal might have upon the conduct of prosecuting attorneys in the grand jury room and United States Attorneys in the court room.

petition for a writ of certiorari is granted, the case be set for argument at the earliest convenience of the Court.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
RICHARD G. GREEN,
DANIEL H. POLLITT,
*Attorneys for Petitioner.*

## APPENDIX A

SUPREME COURT OF THE UNITED STATES

October Term, 1953

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WILLIAM WALTER REMINGTON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

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MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI

Petitioner, William Walter Remington, respectfully requests the Supreme Court of the United States to dispense with the printing of the record in connection with the consideration of the petition for certiorari and in support of said request sets forth the following:

(1) The record was not printed in the Court of Appeals, that court having issued an order dispensing with the printing of the record and allowing review on the typewritten record.

(2) Petitioner's entire financial resources were exhausted long ago. He has no assets, real or personal, other than his personal effects; he has no regular income from any source whatever; he is heavily in debt and in the penitentiary. Consequently, he is unable to pay the cost of printing of the record.

(3) The typewritten transcript of the proceedings of the trial and sentencing contains more than 1100 pages. Petitioner is unable to raise the money, through borrowing or from other sources, to provide for the printing of such a lengthy transcript.

WHEREFORE, for the reasons set forth above, it is respectfully requested that this Court grant petitioner's

motion to dispense with the printing of the record in connection with the consideration of the petition for certiorari.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
RICHARD G. GREEN,
DANIEL H. POLLITT,
*Attorneys for Petitioner.*

## APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1953

No. 60

Argued October 15, 1953 Decided November 24, 1953

Docket No. 22790

UNITED STATES, *Appellee,*

against

WILLIAM WALTER REMINGTON, *Appellant*

Before: L. HAND, SWAN and AUGUSTUS N. HAND, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York, Vincent L. Leibell, Judge.

From a judgment of conviction for perjury committed while testifying in defense to a previous perjury indictment, the defendant appeals. Judgment affirmed.

Joseph L. Rauh, Jr., Richard G. Green and Daniel H. Pollitt, Attorneys for William Remington, Appellant.

J. Edward Lumbard, United States Attorney, for United States, Appellee; James B. Kilsheimer, III, Assistant United States Attorney, Counsel.

AUGUSTUS N. HAND, *Circuit Judge:*

In May 1950, William Remington was called before a federal grand jury for the Southern District of New York which was investigating possible violations of the espionage laws. While testifying before the grand jury, Remington denied that he at any time had ever been a member of the Communist Party. The grand jury returned an indictment for perjury against Remington on the basis of this denial. In the trial following, a verdict of guilty was rendered by the jury but on appeal we reversed the con-

viction and remanded the case for a new trial because of error committed in the charge to the jury. 191 F. 2d 246, cert. denied, 343 U. S. 907. On appeal in that case Remington had also charged that there had been improprieties in the grand jury proceedings which should have forced the indictment to be quashed. We did not pass on the sufficiency of those charges of misconduct on that appeal but ordered the testimony before the grand jury of Remington and his wife be made available to Remington at the new trial.

The government, instead of continuing under the original indictment by going forward with a new trial, obtained a new or second indictment from the grand jury. This indictment, dated October 25, 1951, charged Remington with giving perjured testimony in his defense to the original indictment in the first trial. Specifically five counts were involved: (1) denial of attendance at Communist Party meetings; (2) denial of delivery to Miss Bentley of information to which she was not entitled; (3) denial that he had ever paid Communist Party dues; (4) denial that he had ever solicited members for the Communist Party; (5) denial that he had any knowledge of the existence of the Young Communist League at Dartmouth College where he had been a student from 1934 to 1939. Remington was convicted on counts two and five, acquitted on count four, and the jury was unable to agree on counts one and three.

On appeal from this judgment of conviction the defendant Remington does not allege that any error was committed in the second trial under the new indictment and it is clear from the record that Judge Leibell conducted the trial with great care. However, the defendant has presented us with a rather new and novel argument in his demand for reversal of his conviction and dismissal of the indictment. It is charged that misconduct in the first grand jury proceedings by the government and the foreman of the jury and, further, an alleged concealment by the government during the course of the first trial of evidence of this misconduct, should force the first indictment to be quashed and that trial be declared a nullity. Moreover, if the first indictment and trial was the result of illegal con-

duct on the part of the government, it is argued that under the theory advanced in *Nardone* v. *United States,* 308 U. S. 338, 341, any fruits procured by this illegal conduct should be denied the government. Since Remington would never have been put on the stand in defense of the first perjury indictment but for the procurement of that indictment by illegal conduct of the government, it is said that the government should not be permitted to bring a new indictment as a result of perjured statements made by Remington in his defense, and thus gain a benefit from its illegal conduct. In short Remington in effect urges that perjurious statements made at a trial under an illegally procured indictment cannot be subsequently prosecuted.

This argument of course assumes that there is sufficient evidence of misconduct in the grand jury proceedings to support a motion to quash that indictment. While we need not decide this question in view of our disposition of the appeal, it should be noted in passing that it is far from clear that the minutes of the first grand jury proceeding support a charge of "undue influence" sufficient to make the first indictment illegal. 191 F. 2d 246, 252.

Assuming without deciding that the first indictment is bad because of misconduct in the grand jury proceedings, we can find no authority to support the defendant's argument that perjury committed in a trial under a bad indictment cannot be prosecuted. Indeed, the opinion of the Supreme Court in *United States* v. *Williams,* 341 U. S. 58, would seem to indicate otherwise. There Williams was indicted and convicted for perjury committed in a former criminal trial for conspiracy under the Civil Rights Acts. A conviction in the former trial was reversed and the indictment quashed on the ground that the indictment did not state an offense under the laws of the United States. *United States* v. *Williams,* 179 F. 2d 644 (5th Cir.), affirmed 341 U. S. 70. To the argument that the court in the first trial did not have jurisdiction and thus was not a "competent tribunal" within the meaning of the perjury statute, 18 U. S. C. § 1621, the Court stated: "Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The Dis-

trict Court has such jurisdiction. Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury." 341 U. S. 58, 68-69. Likewise, in the prosecution under the indictment here, the court had jurisdiction over the crime and the defendant, the defendant was under oath to speak the truth, and could not, in our eyes, lie with impunity.

True, the instant case is distinguishable since here the previous indictment and trial is attacked because of government misconduct. The defendant seeks to make use of this distinguishing feature by introducing the doctrines outlined in *Nardone* v. *United States,* 308 U. S. 338, and *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, that " * * * knowledge gained by the Government's own wrong cannot be used by it * * *" 251 U. S. 385, 392. In the *Nardone* case judgment of conviction was reversed on the ground that the government could not use evidence of guilt procured through leads developed from knowledge gained by illegal wire-tapping. Such evidence was fruit of the forbidden tree. Likewise in the *Silverthorne* case, Mr. Justice Holmes reversed a judgment of contempt for refusal to obey a subpoena where the government sought to secure evidence, the whereabouts and knowledge of which they had secured through an admittedly illegal search and seizure. The rationale behind these decisions is that to rigidly enforce due process protections we must deny any or all benefits to the government in its prosecution which can be proven to have resulted from the illegal conduct. In reversing the conviction in the *Nardone* case the Court said: "Once [illegal wire-tapping] is established * * * the trial judge must give opportunity * * * to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the government to convince the trial court that its proof had an independent origin." 308 U. S. 338, 341. We do not see how this theory can be applied in the present case. Here we have a separate crime of per-

jury committed after the illegal conduct by the government as opposed to the above cases where we had only a rule of evidence developed to prevent the government from making use of its illegally procured knowledge. It seems to us an unwarranted extension of that doctrine to apply it here to a new wrong committed by the defendant. Moreover, to call the perjury a fruit of the government's conduct here, is to assume that a defendant will perjure himself in his defense. It is difficult to see any causal relation otherwise between the government's wrong and the defendant's act of perjury during the trial. If this assumption is a premise of the defendant's argument, we cannot accept it for it involves a disregard of the defendant's oath and an assumption that perjury, although a crime, is an inevitable occurrence in judicial proceedings.

It is argued that Remington would never have been in court but for the illegally procured indictment and that to preserve his rights and to rigidly supervise the federal enforcement of our laws, we must deny the government the right to prosecute here. See *McNabb* v. *United States,* 318 U. S. 332. However, supervisory rules concerning speedy arraignment and wire-tapping deal with the admission of evidence directly relating to a government wrong in investigating a past crime. They do not permit the defendant to commit a new and independent crime. We do not preserve justice by allowing further criminal activity to take place. Moreover, as a penalty placed upon the prosecution designed to prevent misconduct in the future, a reversal here would serve no purpose. It cannot be conceived that the government would deliberately procure a false indictment in the hope of later obtaining perjurious statements at the trial. Such statements could more easily be procured in a new grand jury proceeding.

The doctrine of entrapment has been advanced to support the defendant's position but it is not applicable here. The defense of entrapment has been defined as follows: "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act,

the government is estopped by sound public policy from prosecution therefor." *Sorrells* v. *United States*, 287 U. S. 435, 445. If we say the government originated the criminal design here, the defense of entrapment would be available in every case of perjury where the government questions a defendant. When a defendant is questioned about his illicit activities or a crime, he may lie to save himself but we cannot make him immune from prosecution for perjury solely because the government asked him the questions or put him in a position where he would be asked questions.

The doctrine of entrapment has only the most superficial applicability here. Remington was indicted by a grand jury for committing perjury before it. Instead of attacking the indictment for illegality he chose to lie in his defense, as the jury below found. As a result, he was reindicted and now stands convicted of perjury independent from his initial perjury. Remington has been entrapped, not by devious means and methods employed by the government, but by his own acts. He is caught in a web of his own duplicity and zealous prosecution by the government. We should not overturn his conviction where his guilt is clear and to do so would not serve to rigidly enforce a defendant's constitutional rights or prevent government misconduct in the future, but only to weaken our judicial process.

Judgment of conviction affirmed.

L. HAND, *Circuit Judge* (dissenting):

I agree that under *United States* v. *Williams*, 341 U. S. 56, the second indictment gave the District Court jurisdiction to try a perjury committed upon the trial of the first indictment; but that seems to me irrelevant. I do not understand that Remington disputes the court's jurisdiction; his argument is that the prosecution was guilty of such misconduct in procuring the first indictment that, not only could it not prosecute that charge, but that its misconduct protected any testimony given on the first trial from independent accusation. Whether that be right or wrong, I cannot see that *United States* v. *Williams, supra* (341 U. S. 56), touches it at all. The situation in outline was this.

The grand jury was conducting an inquiry into putative espionage activities of Remington and others, in which he and his wife, Ann, both testified at length, as well as a good many others. Brunini was the foreman of the jury and Donegan was the government attorney in charge. The jury found no indictment for espionage, but it did indict Remington for perjury in testifying in the same proceeding that he had never been a member of the Communist Party. Upon the trial of that indictment Remington made the five statements that became counts for perjury in the second indictment, and upon two of these he was convicted. Neither of them was that he had never been a member of the Communist Party; but all five were relevant to that charge. After our reversal of his conviction under the first indictment, the prosecution did not move it on for another trial; and it still stands undisposed of, the Supreme Court having refused to allow the prosecution to withdraw it. Another grand jury found the second indictment, based, as I have just said, upon alleged perjuries committed on the trial of the first; and, so far as appears, there were no irregularities in the proceeding that resulted in this indictment; nor does Remington seek to reverse the conviction under it because of anything that took place on the second trial. The questions, as I see them, are: (1) whether any misconduct of Donegan and Brunini at the grand jury proceeding that led to the first indictment made it subject to quashal; and (2) whether, if so, Remington could be convicted for testimony upon the trial of that indictment.

The most vulnerable feature of the grand jury proceeding that resulted in the first indictment was the treatment of Remington's wife, Ann, during her testimony early in the inquiry and before Remington had himself testified. She was questioned continuously for about four hours and was obviously reluctant to disclose what she knew of her husband's connection with the Communist Party, and of his dealings with Elizabeth Bentley while she had been a Communist. The inquiry was particularly directed to what information, if any, Remington had given Miss Bentley, and, even more especially, to whether he had paid her his party dues. Ann Remington had very frankly given as her reason

for not wishing to testify that her husband's conviction would imperil the support he gave her and her children; and it was this unwillingness that caused the pressure that was put upon her. It is impossible to appraise whether the examination as a whole went beyond tolerable limits without reading all her testimony up to the point where she broke down and finally admitted that Remington did "give this money to the Communist Party." After that she became generally complaisant, and gave testimony exceedingly damaging to him. However, I agree that, when faced with a patently unwilling witness, the grand jury was free to press her cross-examination hard and sharp; truth is more important than the sensibilities of the witness. Moreover, people will always differ as to the point where legitimate pressure ends and improper coercion begins. I can only say that for myself the examination went beyond what I deem permissible. Pages on pages of lecturing repeatedly preceded a question; statements of what the prosecution already knew, and of how idle it was for the witness to hold back what she could contribute; occasional reminders that she could be punished for perjury; all were scattered throughout. Still she withstood the examiners, until, being much tried and worn, she said: "I am getting fuzzy. I haven't eaten since a long time ago and I don't think I am going to be very coherent from now on. I would like to postpone the hearings. * * * I want to consult my lawyers and see how deep I am getting in." This was denied, and the questioning kept on until she finally refused to answer, excusing herself because she was "tired," and "would like to get something to eat. * * * Is this the third degree, waiting until I get hungry, now?" Still the examiners persisted, disregarding this further protest: "I would like to get something to eat. But couldn't we continue another day? Or do I have to come back?" Thereupon there took place what I quote in the margin,[1] and what

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[1] *By Mr. Donegan:*

Q. Well, do we have to go through all this background? We are right down to the issue right now, after all this time we have just reached the question now. Why not answer that question, and then we'll postpone it for another day; if you answer that question, we'll postpone it for another

proved to be the *coup de grace,* after which she made a full disclosure of what she knew: a very large part of it what Remington had told her during their marriage and before they separated in January, 1947.

Even though the testimony so extracted had not so largely consisted of privileged communications, I should have hesitated a long time before I let an indictment stand that

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day. That isn't going to involve you, is it? It couldn't involve you. All you have to do is say yes or no as to whether that money was for the Communist Party. And your yes or no isn't going to decide the issue, I'll tell you that; it's something else that exists. You know that I wouldn't ask you questions—you can't accuse me of fishing in here. I haven't learned anything yet. A. Well, I don't want to answer.

*By the Foreman:*

Q. Mrs. Remington, I think that we have been very kind and considerate. We haven't raised our voices and we haven't shown our teeth, have we? Maybe you don't know about our teeth. A witness before a Grand Jury hasn't the privilege of refusing to answer a question. You see, we haven't told you that, so far. You have been asked a question. You must answer it. If a witness doesn't answer a question, the Grand Jury has rather unusual powers along that line. We are, to a certain extent, what you might call a judicial body. We can't act, ourselves. Our procedure is, when we get a witness who is contemptuous, who refuses to answer questions, to take them before a Judge. Now, at that point there will be a private proceeding. He will instruct the witness to answer the question. Then we come back here and put the question again. If the witness refuses to answer the question, we take him back to Court and the Judge will find him in contempt of Court and sentence him to jail until he has purged himself. "Purging," in that case, is answering the question. Now, I have already pointed out to you that you have a question from the Special Assistant to the Attorney General: Did your husband or did he not give this money to the Communist Party? You have no privilege to refuse to answer the question. I don't want at this time to—I said "showing teeth." I don't want them to bite you. But I do want you to know that. And remember, you have a very sympathetic body here. We want to avoid anything like that. I didn't mention, of course, the second proceeding before a jury is of course a public hearing. And I mention that to you in fairness because I do know that you have a certain grave concern about what your obligations are, and I think in fairness to you we should tell you that. And in view of the time and, I think, the empty stomachs of all the Jurors—I know mine is very empty—I think we can very quickly dispose of things if you will just proceed now. I think you have in your heart answered the questions as to what your procedure should be. (To Mr. Donegan) Do you want to put the question again?

Q. Can you find that question, Mr. Reporter? A. My answer is yes.

depended upon it. Especially important is the fact that the examination was *ex parte* and without the presence and control of a judge or any other impartial official, to pass upon objections made by an opposite party, or intervene *ex proprio motu* to protect the witness. The privilege against self-incrimination itself arose because of the abuses of the "ex officio examination" in the 17th century in the Star Chamber and the Ecclesiastical Commission,* where there was no judge, and which was *in camera* after the model of the Holy Office itself. Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination. Beginning with *McNabb* v. *United States,* 318 U. S. 332 and ending with *Stein* v. *New York,* 346 U. S. 156, the Supreme Court has shown itself extremely sensitive to the opportunities for oppression that such examination offers; and the present time is hardly a propitious season to abate that vigilance. It is true that the decisions I mention were all, I think, occasions on which the evidence excluded was obtained from a person charged with crime; but I cannot see that that is relevant, except perhaps in point of degree. The notion that evidence forced from a witness shall not be used originally depended, or was said to depend, upon the likelihood that it might be false. That was especially the ground for refusing an uncorroborated confession as enough support for a conviction; just as it was the doctrine of the Roman, and of the Canon, law that evidence extracted by torture must be corroborated. I do not suggest that that may not still be one ground in situations like this; but whatever may be the reasonable doubts as to the credibility of evidence so procured, the decisions also rest upon a quite different consideration. When the question arises in a prosecution for crime, the courts regard the prosecutors as parties to the controversy and will not allow them to use the fruits of their own wrongs. It is as though there were a carry over from the civil maxim: *ex turpi causa non oritur actio.*

However, I shall assume for argument that, had there been nothing more than I have mentioned, the indictment

* Wigmore, § 2250.

might have stood up. It is the added circumstance that, as I have already said, a very large part of Ann Remington's testimony consisted of confidential communications from her husband to her, that satisfies any doubts I might otherwise have had. That was testimony as much privileged in a federal court,[2] as in a state court; moreover, the privilege extends to a proceeding before a grand jury.[3] Although I have found no federal decisions, I accept it also as the law that her later separation and divorce from Remington did not open the witness's mouth;[4] indeed, any other view would be completely inconsistent with the theory of the privilege. It will have been observed how important a part this played in the result, for in his final admonition that effected her breakdown, Brunini not only threatened her with contempt proceedings, but expressly told her that she had no privilege. His language is worth repeating: "Now, I have already pointed out to you that you have a question from the Special Assistant to the Attorney General: Did your husband or did he not give this money to the Communist Party? *You have no privilege to refuse to answer the question.*" Read literally, that was true; but, read as the witness must have understood it—that is, whether her husband had not told her so—it was altogether false. I do not intimate that Brunini, a layman, thought it false; but Donegan was present, and he did not intervene to correct the mistake.

I shall not consider the other alleged irregularities in the proceeding of the grand jury, because what I have recited would alone in my judgment have required the indictment to be quashed, had the case gone back for a new trial. In saying so, I do not forget that there was other testimony adequate to support the charge that Remington had sworn falsely when he said that he had never been a member of the Communist Party; or that, in those not very numerous instances in which courts have considered the admission of incompetent evidence before a grand jury, they have held pretty generally, though not uniformly, that the indictment

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[2] *Wolfle* v. *United States*, 291 U. S. 7.

[3] *Blau* v. *United States*, 340 U.S. 332.

[4] Wigmore, § 2341.

will stand, provided that the jury had before it other adequate competent evidence to support the charge.[5] This has been the rule, in spite of the obvious fact that the same reasoning by which courts upset the verdict of a trial jury, applies as much to the finding of an indictment: *i.e.*, the incompetent evidence may have furnished the makeweight that turned the scale. The answer has ordinarily been that a grand jury need only be satisfied that there is reasonable ground to suppose the accused guilty;[6] and that an indictment is only an accusation, which must be followed by a trial at which all incompetent evidence will be winnowed out. Even as *res integra*, I should think the same. There are so few occasions when it is possible for the accused to get access to the proceedings of a grand jury, that an opposite rule would at best work capriciously; and in any event the answer depends upon whether the hindrance to the effective punishment of crime by allowing the accused to pick over the evidence does not outweigh any injustice he may suffer, if that privilege be denied him. But I am convinced that this rule should not excuse oppression and deceit in procuring the indictment. The postulate on which the exclusion of such testimony depends, must be that only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be

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[5] *Holt* v. *United States*, 218 U. S. 245, 248;
*McGregor* v. *United States*, 134 Fed. Rep. 187, 192, 193 (C. A. 4);
*Chadwick* v. *United States*, 141 Fed. Rep. 225, 235 (C. A. 8);
*McKinney* v. *United States*, 199 Fed. Rep. 25, 28, 29 (C. A. 8);
*Anderson* v. *United States*, 273 Fed. Rep. 20, 29 (C. A. 8);
*Murdick* v. *United States*, 15 Fed. (2) 965, 967, 968 (C. A. 8);
*Olmstead* v. *United States*, 19 Fed. (2) 842, 845 (C. A. 9);
*Kastel* v. *United States*, 23 Fed. (2) 156, 158 (C. A. 2);
*Friscia* v. *United States*, 63 Fed. (2) 977, 980 (C. A. 5);
*Wiggins* v. *United States*, 64 Fed. (2) 950, 952 (C. A. 9);
*Tinkoff* v. *United States*, 86 Fed. (2) 868, 877 (C. A. 7).

[6] *Beavers* v. *Henkel*, 194 U. S. 73, 85;
*Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 599;
*Respublica* v. *Shaffer*, 1 Dallas 236;
*Shushan* v. *U. S.*, 117 Fed. (2) 110, 113 (C. A. 5);
*U. S.* v. *Direct Sales Co.*, 40 Fed. Supp. 917.
The variant introduced by Field, J., in his charge to the Grand Jury (Fed. Cas. 18255) has never taken root and may be disregarded.

secured; for in modern times all prosecution is in the hands of officials. It was not so in ancient times when a private person might appear before a grand jury and present his grievance, and when the initiative in criminal prosecution depended for the most part upon the victim's desire to retaliate. Whether or not that was ever an adequate check upon official misconduct, it no longer exists; and, as officials are for all practical purposes immune from any sanctions, the situation seems to me to justify invoking the principle that, when it is doubtful how far the consequences of a wrong have gone, the burden is on the wrongdoer to prove what they actually were. Hence it would follow here that, since the prosecution did not, and could not, show whether Ann Remington's testimony turned the scale, the first indictment could have been quashed—a point that, incidentally, we left open on the first appeal.

It was to escape this risk that that indictment was abandoned; but I do not believe that by this device a prosecution should escape the consequences of its wrong. For that conclusion I rely upon the doctrines laid down in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Sorrells* v. *United States,* 287 U. S. 435, both of which, though challenged at the time, have now fully established themselves as a part of federal criminal law. The doctrine of the first of these—that the prosecution may not use evidence that it has unlawfully obtained—must depend, I suggest, upon the premise that the gathering of evidence is a step in the procedure for the punishment of crime; and that to gather it unlawfully is as much a denial of a part of that procedure as would be the denial of any formally prescribed step. Now the finding of the first indictment was a necessary part of the evidence in the case at bar, because without it nothing that Remington said in the first trial would have been perjury, no matter how false it was. I do not see any difference in principle between obtaining the first indictment by the unlawful extraction of evidence, necessary to its support, and obtaining a document by an unreasonable search. Surely this would not be denied in an extreme situation: as, for example, if the prosecution had suborned the witnesses, or threatened to prosecute them,

if they did not swear as directed. Coming next to the doctrine of *Sorrells* v. *United States, supra,* which makes "entrapment" a defence, it depends, as I understand it, upon the repugnance of decent people at allowing officials to punish a man for conduct that they have "incited" or "instigated," and to which by so doing they have made themselves accessories. Now it is of course true that by finding the first indictment and bringing it on for trial, those responsible for doing so did not "incite" or "instigate" Remington to repeat on the first trial the testimony that he had given on the grand jury proceeding; and I agree that, if that express relation to the crime is essential to the defence, it did not exist here. But I do not think that the doctrine should be so narrowly confined. Having committed himself upon the grand jury proceeding to a denial of his membership in the Communist Party, Remington at the trial of the indictment based upon that denial, could not escape repeating what he had said, for, if he did not take the stand, it would have been equivalent to a plea of guilty. Therefore, I do not see how it can be denied that the finding of the first indictment was as direct a provocation of the perjury for which he has been convicted, as the persuasion of agents or officials of the prosecution would have been, had they "incited" or "instigated" him to perjure himself; so that in point of causation I insist that the situations are the same. And so the question comes down to whether there is any difference between the repugnance that decent people would feel at punishing a man for perjury that the officials or their agents persuaded him to commit, and the repugnance they would feel if the officials induced him to perjure himself by securing an indictment for perjury against him by illegal means, when they knew he must inevitably repeat the perjury in his defence. Again, as I said a moment ago, if the indictment had been obtained by subornation of the witnesses, or by threats of their imprisonment, I cannot believe that ordinary people would draw any distinction. In any case I should not so long as the unlawful means were such that, if they had been disclosed, they would have resulted in a dismissal of the indictment and would therefore have removed the compulsion

that induced the crime. For these reasons it seems to me that the case at bar is within the implied ambit of the doctrine of "entrapment" as well as it is within that of the doctrine against using evidence unlawfully obtained.

I think that the conviction should be reversed, and the indictment dismissed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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No. 506

WILLIAM WALTER REMINGTON, *Petitioner*

v.

UNITED STATES OF AMERICA

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**On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit**

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. CII-CXVIII)[1] are not yet

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[1] The designation R. refers to the typewritten "record on appeal" in this cause. Tr. refers to the typewritten transcript of testimony on this trial. References to the transcript of the previous trial are designated as No. 387 Tr. References to the transcript of the testimony before the grand jury which returned the first indictment are designated as G.J.

reported. The opinion on petitioner's prior conviction is reported at 191 F. 2d 246, certiorari denied, 343 U.S. 907.

## JURISDICTION

The judgment of the Court of Appeals was entered November 24, 1953 (R. CXIX). The petition for a writ of certiorari was filed December 23, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

## QUESTION PRESENTED

Whether alleged irregularities by the grand jury which returned the first indictment would constitute a defense to a second indictment for perjury committed by the defendant in testifying in his own defense at the trial of the first indictment.

## STATUTE INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states

or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

**STATEMENT**

Petitioner was convicted on counts II and V of an indictment returned against him on October 25, 1951, in the United States District Court for the Southern District of New York, which charged him with having committed perjury while testifying in his defense on the trial of a prior indictment for perjury. (R. A, I-VI, XXXIV.) Count II alleged that petitioner at such trial falsely testified that he had not given to Elizabeth Bentley information to which she was not entitled, and count V that he falsely denied any knowledge of the existence of the Young Communist League at Dartmouth College when he was a student there (R. I-VI). Petitioner was sentenced to three years on each count, the sentences to run concurrently (R. XXXIV). On appeal the judgment was affirmed, one judge dissenting (R. CXIX).

On appeal to the Court of Appeals, as in the present petition for certiorari, no issue was raised with respect to the trial, the sole contention being that the indictment in this case should have been dismissed because of alleged irregularities in the conduct of the grand jury which returned the in-

dictment forming the basis of the earlier trial at which the perjury alleged in the present indictment was committed.

The prior indictment against petitioner, returned on June 8, 1950, charged him with having committed perjury before a grand jury in denying that he had ever been a member of the Communist Party. Petitioner was convicted of that offense, but on appeal the conviction was set aside and the cause remanded for a new trial because of various trial errors, including failure properly to instruct the jury and denial of petitioner's motion to inspect the minutes of his testimony before the grand jury. 191 F. 2d 246, 250-251. Petitioner also raised on appeal the contention that the indictment should have been quashed for the reason that Brunini, the foreman of the jury, allegedly had a financial interest in a book written by the prosecution's witness Miss Bentley, and had allegedly exercised undue influence in the procurement of the indictment. See 191 F. 2d at p. 252. The Court of Appeals declined to pass upon the issue stating (191 F. 2d at p. 252):

> Since we have already held that the accused must be given access to the minutes of his own testimony before the grand jury, it will appear upon inspection whether Brunini abused his powers, at least in that part of the proceedings. The indictment should not be quashed unless undue influence is shown.

A petition for certiorari filed by petitioner, seeking a judgment of acquittal or dismissal of the indictment, was denied by this Court, 343 U.S. 907 (No. 387, 1951 Term).

The Government chose to proceed on the present indictment, which was returned during the pendency of the petition for certiorari, rather than to retry petitioner on the 1950 indictment. On May 5, 1952, petitioner moved in the District Court to have the instant indictment dismissed on the ground that it violated due process of law, or, in the alternative, for inspection of the grand jury minutes and a hearing on the issue of undue influence by the foreman (R. XX-XXI). That motion was denied "on the authority of *United States* v. *Williams,* 341 U.S. 58 and *United States* v. *Remington,* 2 Cir., 191 F. 2d 246" (R. XXII). At the opening of the trial and at its conclusion, petitioner unsuccessfully renewed the motion to dismiss the indictment (Tr. 3-8, 896-900).

During the trial of the instant indictment, petitioner was granted leave to inspect the minutes of his testimony before the first grand jury and the testimony of his former wife (Tr. 146, 832-853). On motion of counsel for an order directing that such portion of the grand jury minutes be delivered to them (R. XXXVIII-XLIX), counsel were given leave to inspect such minutes at the office of the United States Attorney with the proviso that they should not quote from such

testimony but refer to the pages (R. XCI-XCIII). The minutes of the grand jury were before the Court of Appeals and have been filed with the Clerk of this Court.

The majority of the Court below, in affirming petitioner's conviction, stated (Pet. 47):[2]

> While we need not decide this question in view of our disposition of the appeal, it should be noted in passing that it is far from clear that the minutes of the first grand jury proceeding support a charge of "undue influence" sufficient to make the first indictment illegal.

The holding of the majority was that, even assuming that the first indictment was invalid because of misconduct in the grand jury proceedings, petitioner was nevertheless subject to prosecution for his separate and independent act of perjury at the trial under that indictment. The majority said (Pet. 48) "the court had jurisdiction over the crime and the defendant, the defendant was under oath to speak the truth, and could not, in our eyes, lie with impunity. As to the argument that petitioner was entrapped into committing such perjury, the majority stated (Pet. 50):

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[2] Since there is only one copy of the typewritten record in this case, references to the opinion below will be to the copy printed as an Appendix to the petition.

Remington has been entrapped, not by devious means and methods employed by the government, but by his own acts.

## ARGUMENT

1. Perjury is a crime which strikes at the very foundations of the judicial process. As this Court pointed out in the case of *United States* v. *Williams,* 341 U.S. 58, 68 "the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony." Hence, this Court held in that case, at pp. 68-69, that "Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury." A person who takes an oath to tell the truth before a tribunal having competency to hear the subject matter has a duty to tell the truth. His wilful failure to do so is perjury.[3]

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[3] The same philosophy is embodied in cases arising under the statute making it a crime to make false statements in a matter within the jurisdiction of an agency of the United States, presently 18 U.S.C. 1001. It is not a defense to such a charge that the statute under which the agency acted was unconstitutional *United States* v. *Kapp,* 302 U.S. 214, 217-218, *Kay* v. *United States,* 303 U.S. 1, 6-7; or that the agency was not validly constituted *United States* v. *Meyer,* 140 F.

Petitioner argues that this case is different because the invalidity of the indictment is alleged to have resulted from the wrong of officers of the government. He seeks to invoke the concept of the "fruits of the poisonous tree", embodied in such cases as *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, and *Nardone* v. *United States,* 308 U.S. 338, holding that evidence obtained from improperly seized material is in itself inadmissible. That concept, however, relates to a situation where the government, without any action by the defendant, uses illegally obtained evidence to obtain further evidence. Thus in *Silverthorne,* the government sought to introduce photostats of the evidence which had been returned because illegally seized. Between the initial illegal search and the evidence offered at the trial there was no intervening act of the defendant.

This situation is different. Neither the return of the earlier indictment nor the trial under that indictment could in themselves lead to a subsequent prosecution for perjury without new, independent, affirmative action by the defendant. As the majority below points out, to find a causal relation between the government's alleged wrong and the defendant's perjury requires an assump-

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2d 652, 654-655 (C.A. 2); or that the maker could not validly be required to file a statement, *United States* v. *Rubinstein,* 166 F. 2d 249, 254 (C.A. 2), certiorari denied, 333 U.S. 868.

tion that any defendant accused of crime will inevitably perjure himself in his defense (Pet. 49). No principle of judicial administration can be based on such an assumption.

The situation here presented is analogous to *United States* v. *Bayer,* 331 U.S. 532 and *Lyons* v. *Oklahoma,* 322 U.S. 596, in which this Court held that the fact that a first confession was inadmissible because of coercion or lack of arraignment would not render inadmissible a second confession voluntarily made. In the *Bayer* case, in overruling the holding of the Second Circuit that the second confession was the fruit of the earlier inadmissible one (156 F. 2d 964, 970), this Court said, 331 U.S. at pp. 540-541:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases, relied on by the Court of

> Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question. * * *

The basic difference in the two types of cases is that in the confession cases there is an intervening exercise of free will by the person allegedly injured.

Certainly there is at least as much causal relationship between the earlier and a later confession as there is between the return of an indictment and a defendant's subsequent voluntary decision to lie in his defense.[4] Petitioner cannot rely on alleged earlier wrongdoing by the government to excuse his deliberate, independent and uncoerced exercise of free will in deciding to commit perjury.

2. The preceding discussion disposes of the actual issue which is before this Court. The petition for certiorari, however, makes unwarranted assertions that we cannot permit to go unchallenged.

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[4] As a matter of fact, petitioner's perjury before the first grand jury cannot truly be said to have been caused by the alleged irregularities. As we show *infra*, petitioner, before he made the statements charged in the first indictment to have been false, had been told by his ex-wife that he would not like her testimony (G.J. 7995) and he was explicitly warned by the grand jury that the evidence hitherto gathered by them indicated that he had been an active member of the Communist Party (G.J. 8031).

a. Petitioner repeats the innuendos of his petition for certiorari in the prior case (No. 387, 1951 Term) that Thomas E. Donegan, the Special Assistant to the Attorney General, had a special interest in the prosecution of petitioner because he had been Miss Bentley's counsel (Pet. 4, 17). Petitioner knows by the record of the first trial that these aspersions are unwarranted. It appeared in that record that Mr. Donegan stated to the court that Miss Bentley, whom he had not previously met, came to him as a client when he was engaged in private practice. As soon as it appeared that he might be asked to return to Government service as a special prosecutor, he withdrew as Miss Bentley's attorney, advising her that he wished to be relieved because of the possibility that she might be called as a witness, and he informed the grand jury of his former representation of Miss Bentley. (No. 387, Tr. 1390-1391; 1521-1524.)

b. Petitioner asserts as a fact that Brunini, the foreman of the jury, had a financial interest in Miss Bentley's book (Pet. 4, 12-14, 29-30). He makes this assertion wholly on the basis of the record at the earlier trial, although as we pointed out in the brief in opposition in No. 387, 1951 Term, the record was incomplete and certainly did not establish such fact.

At that earlier trial, Miss Bentley testified on cross-examination that Brunini had given her

moral and editorial support but denied that he had any financial interest in the book (No. 387, Tr. 1377-1380). The defense then called two former employees of the publisher who testified that an earlier agreement with the publisher under which Brunini was to be Miss Bentley's literary assistant and receive part of the proceeds had been prepared (No. 387, Tr. 1598-1600; 1537-1546). They did not know whether this earlier contract had been signed (No. 387, Tr. 1546, 1610). Brunini was not called upon to testify, nor were the publishers, although two of them were in the courtroom, one under subpoena by petitioner (No. 387, Tr. 1585-1587).

On the trial of this case, Miss Bentley again denied that Brunini had a financial interest in her book (Tr. 276-277). One other significant fact appears of record, that 22 members of the grand jury voted for the first indictment against petitioner (Tr. 895-897). And while it is true that petitioner's motion for dismissal of this indictment was denied on grounds which precluded a hearing on the validity of the first indictment (see Statement, *supra*), it is significant that there was no offer of any additional proof of any kind which would tend to support reiteration of the assertions that Brunini had a financial interest in the book.

c. There is also the reassertion, wholly on the basis of the earlier record, that the United States Attorney deliberately withheld information con-

cerning the collaboration of Bentley and Brunini (Pet. 5, 15-16, 34-35). This stems from the United States Attorney's statement on the first trial that he had in his files a narrative of facts concerning the Bentley-Brunini collaboration and that he had discussed the matter with the Attorney General (No. 387 Tr. 1526-1527).

As was pointed out in the brief in opposition to certiorari in No. 387, 1951 Term, p. 16, the United States attorney's office was consistently of the opinion that at no time did Brunini have a financial interest in the book.[5] The fact of collaboration was learned some weeks after, not before, the indictment was returned, and it is fair to assume that the discussion with the Attorney General related to the propriety or desirability of obtaining a new indictment. Since the United States Attorney knew the fact, which in this trial is of record, that 22 grand jurors voted for the indictment, he could assume that any possible disqualification of Brunini would not have invalidated the indictment.[6] *United States ex rel.*

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[5] As noted above Miss Bentley again at the instant trial denied that Brunini had such financial interest (Tr. 276-277).

[6] Rule 6 (b) (2) of the Federal Rules of Criminal Procedure provides that:

> A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand

*McCann* v. *Thompson,* 144 F. 2d 604, 606 (C.A. 2), certiorari denied, 323 U.S. 790. As to possible undue influence by Brunini on the other 21 jurors, we believe that the minutes of the grand jury proceedings which we discuss below, wholly fail to establish such fact, and we doubt that the possibility of such a defense on petitioner's behalf would have occurred to the United States Attorney.

d. The only new matter in this petition stems from the minutes of the grand jury testimony of petitioner and his former wife, volumes one and two of the grand jury testimony filed with this Court.[7] It is with respect to the testimony of Mrs. Remington that the dissenting judge below found misconduct in the grand jury proceedings. But with all deference to the dissenting judge below, we suggest that the dissenting opinion gives a distorted version of what occurred during her testimony, a distortion which can properly be rectified only by a reading of the entire portion of the transcript.

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jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

[7] There are two other volumes of the grand jury testimony which were filed under seal with the Court of Appeals. The testimony of Mr. Egan, Miss Bentley's attorney, as to which petitioner makes insinuations (Pet. 5, 27) appears in volume 3. This Court can see from those minutes the reason Mr. Egan was called.

Mrs. Remington first testified before the grand jury that she and her husband were not members of the Communist Party, that they had been sympathetic but had gradually broken away. She stated she had very little recollection of Miss Bentley (G.J. 7744-7771). The Grand Jury, chiefly through Mr. Donegan, but occasionally through the foreman or other grand jurors,[8] began pointing out the discrepancies between her testimony and the facts theretofore admitted by petitioner in public hearings and discrepancies in her own testimony (G.J. 7766, 7771-7774, 7778-7780).

Quite early in the testimony, Mrs. Remington was asked if she was in a position to stay overnight, and when she said she was not, Mr. Donegan stated that they would excuse her in time to go back (G.J. 7781). A short time later, Mr. Donegan suggested that before requiring her to appear again they would relay the request through an F.B.I. agent and try to make her appearance as convenient as possible (G.J. 7791). In fact, Mr. Donegan asked the jury whether they had any more questions and excused Mrs. Remington for a few minutes so that the grand jury could discuss the matter (G.J. 7793).

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[8] The amount and nature of the questioning by jurors other than the foreman which appears in the transcript is itself an answer to the suggestion of "undue influence" by Brunini. It seems evident from the transcript as a whole that other jurors were themselves very interested in the issues before them and well informed on the evidence theretofore received.

When she came back, Mr. Donegan told her that the jury did not want to keep her any longer, but that they would probably require further testimony from her in the future. He stated frankly that from the jury's point of view, the issue was not whether her former husband was at the time a Communist, but that the important issue was the Bentley period. (G.J. 7794-7795.) Mrs. Remington then volunteered the statement that she was a reluctant witness because if petitioner was convicted, she would be without support (G.J. 7795). Mr. Donegan tried to persuade her that it was her duty to tell the truth, and the foreman and another juror joined in trying to explain to her why it was important that the truth be revealed (G.J. 7796-7813). At one point, Mrs. Remington said she wished they would get other witnesses; that if petitioner was convicted as an espionage agent and went to jail it would be quite different from losing his job (G.J. 7801). Mrs. Remington then answered some questions about Redmont, whom petitioner had introduced to Miss Bentley (G.J. 7815-7819). She was asked about the period when she and petitioner were first introduced to Miss Bentley by Golos, Bentley's espionage principal, and was asked whether she had any doubt that the purpose was to get information from her husband (G.J. 7819). At this crucial point, she said she hadn't eaten and would like to postpone the hearings (G.J. 7820). When asked whether she

wanted to eat and come back, she said she meant another day; that she wanted to consult her lawyer and see how far she was getting involved (G.J. 7820). After being told that she herself was not getting in deep (G.J. 7820), she admitted that her husband did discuss the fact that he was giving information to Bentley (G.J. 7823). She was then asked whether she knew the reason her husband was giving money to Bentley, and said that she didn't wish to answer questions, that she didn't like to contradict the testimony her husband had given (G.J. 7824-7825). It was in this connection that she renewed her claim of hunger (G.J. 7825-7826) and was told that if she answered that question the matter would be postponed (G.J. 7826). At this point also the foreman made the statement quoted by the dissenting judge below (Pet. 53), and Mrs. Remington gave the yes answer to the question (G.J. 7826-7828). The session recessed at 3:16 p. m. (G.J. 7830).

Surely it was not unreasonable conduct for a government prosecutor and a grand jury, who had before them a witness who volunteered the information that she did not wish to testify and almost admitted that her testimony might sustain a charge of espionage, to explain to the witness that it was her duty to tell the truth and to try to convince her that her own best interests and those of her country lay in the disclosure of the truth. The "pages on pages of lecturing" to

which the dissenting judge below refers (Pet. 52) are patient and sympathetic attempts to do just that. The only suggestion of anything remotely resembling a threat is the statement of the foreman quoted by the dissenting judge below (Pet. 53) and this on its face can hardly be called an improper threat. And surely it is not unreasonable for the jury, having almost persuaded the witness to talk, to be reluctant to recess at just that point. It is very evident that Mrs. Remington's claims of hunger were really an attempt to avoid answering. Three o'clock may be later than the usual lunch hour, but a short delay scarcely amounts to such privation as would induce a witness to commit perjury. As for the contention of petitioner that thereafter Mrs. Remington was bound to commit perjury at two trials months, even years, later (Pet. 33), this reveals a cynical view of perjury as normal conduct, the same view which underlies the basic argument advanced in this cause, that petitioner's own perjury was not an exercise of his own free will.

The dissenting opinion rests primarily on the theory that there was misconduct in failing to inform Mrs. Remington that she was not to testify to confidential communications from petitioner during the period of marriage (Pet. 54-55). The marital confidence privilege, however, does not apply to communications between husband and wife if a third person was present or if the trans-

mission of the communication to a third person was intended. 8 Wigmore *Evidence* (3rd ed., Sec. 2336); see also *Wolfle* v. *United States*, 291 U.S. 7.

Before Mrs. Remington testified, the grand jury had reason to believe that she had considerable information which could not possibly be subject to the marital confidence privilege.[9] It is clear that Miss Bentley had testified that Golos introduced her to petitioner and his wife at a restaurant in New York. Manifestly, the conversation at the time would not be subject to the privilege. It is also clear that Bentley had testified that she had seen Mrs. Remington in Washington and it was certainly possible, as at the trial was proved to be the fact (Tr. 172), that dues had been paid in the presence of Miss Bentley—again a transaction that would not be subject to the privilege.[10] It is significant that at the trial, Mrs. Remington gave important testimony, although the court warned government counsel of the limitation of the marital confidence privilege (Tr. 155-156).

The most that can be said is that some questions were asked before the first grand jury about conversations which might come within the marital confidence privilege. But certainly, in view of the

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[9] It should be noted that Mrs. Remington testified at the outset that she had consulted a lawyer before appearing (G.J. 7741).

[10] It should be noted that the question specifically referred to in the dissenting opinion below as violating the marital privilege (Pet. 55). related to the payment of dues to Miss Bentley.

fact that the significant testimony referred to above was clearly not privileged, the failure to warn the witness of the existence of the privilege cannot justifiably be said to be such gross misconduct as would not only invalidate the indictment, but excuse deliberate perjury committed by petitioner in a trial under such indictment.

The fallacy of the dissent below is even more clear when consideration is given to petitioner's own testimony before the grand jury. Before petitioner was asked the direct question as to his membership in the Communist Party, he admitted that his former wife had told him that he would not like the testimony she had given (G.J. 7995). Yet when asked whether he was a member of the Communist Party he denied membership (G.J. 8019). He was then warned that one Bridgeman and Miss Bentley had sworn under oath that he was a Communist, but he still denied membership (R. 8019). Thereafter, he was explicitly warned that the evidence before the grand jury all pointed to the fact that he was affiliated with the Communist Party in Knoxville and up to the time he went into the Navy (G.J. 8031). Yet three days later he again denied that he was a member of the Communist Party (G.J. 8200). Considering the full warning given petitioner, considering the ample opportunity given to him to reconsider, considering the existence of substantial evidence as to his membership in the Communist Party at Knoxville,

it is hard to understand how the dissenting judge below could hold that what he found to be intimidation of Mrs. Remington caused petitioner's indictment. It is even harder to understand how in the face of all these warnings, the dissenting judge below and petitioner can talk in terms of entrapment.[11]

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[11] As to the alleged "grilling" of petitioner and alleged inquiries into irrelevant matters, petitioner's testimony reveals that his own evasiveness and indirectness contributed more to the length of his questioning than any action by the grand jury. For example, after petitioner testified on Monday that he talked with his former wife the previous Friday about her appearance before the grand jury (G.J. 7981-7983), it took over an hour to get him to tell what they had discussed (See G.J. 8002, 8009, 8020). As for the alleged irrelevant matter, considering the fact that petitioner had testified before the Senate committee that his divorce was due to the fact that he did not like his wife's Communism (See G. J. 8048-8049), the circumstances of his divorce were not irrelevant. And considering that petitioner testified that he regarded the settlement of the libel suit as sufficient vindication (G.J. 8222), the circumstances of the settlement were also not irrelevant. Undoubtedly in the 400 pages of testimony, some questions not strictly relevant can be found, but an investigation is, of course, far different from a trial.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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HAROLD B. WILLEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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# No. 506

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WILLIAM WALTER REMINGTON,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## REPLY BRIEF FOR PETITIONER

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*Attorneys for Petitioner.*

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Petitioner's three-year struggle to obtain the full facts concerning the gross misconduct of Grand Jury Foreman Brunini, Prosecutor Donegan and United States Attorney Saypol, and to bring those facts to the attention of this Court, has met at every turn with governmental obstruction, at times with governmental deceit. When, in January 1951, the defense learned of the Bentley-Brunini relationship during the first trial and subpoenaed two wholly disinterested witnesses to testify to this relationship, the United States Attorney, though he himself knew this relationship to exist (R. 1526-27), sought to discredit these

witnesses by trickery (R. 1615-31) and by shouting to judge and jury that they were "liars" (R. 1631). When, at this same time, the defense sought to examine the minutes of the grand jury to show the extent of the misconduct of Brunini and Donegan, the United States Attorney opposed all efforts to obtain these minutes with the deceitful assurance to the trial judge that there had been an "utter absence of irregularity" (R. 1519) in the grand jury proceedings and that the charges of grand jury improprieties were "made of whole cloth" (R. 3134) and were in fact a "straw man" (R. 3127-28). When, in October 1951, petitioner urged this Court to review the gross misconduct of Brunini, Donegan, and Saypol, the Government sought to avoid this review by the unusual step of reindicting petitioner while the matter was pending here and announcing that the indictment under consideration would be dropped in favor of this reindictment (for statements made by petitioner while on the witness stand in his own defense against the first indictment). When, in May 1952, petitioner moved to dismiss the first and second indictments on the basis of the grand jury improprieties (S. XX-XXI) and supported that motion with an affidavit setting forth the fact of the literary and financial collaboration of Bentley and Brunini (S. XXIa-XXIe), the Government refused to put that fact in issue by filing an answering statement under oath; instead it opposed petitioner's motion upon the authority of *United States* v. *Williams*, 341 U. S. 58, and thereby admitted the fact of literary and financial collaboration. When petitioner's counsel, for purposes of preparing his appeal, sought access to the minutes of petitioner's and Ann Remington's testimony before the first grand jury (these minutes having been made available to petitioner's trial counsel for the purpose of direct and cross-examination respectively (S. 832-853, 146) and having thereafter been

returned to the Government), the Government vigorously opposed petitioner's counsel even seeing these minutes for purposes of preparing petitioner's appeal (S. XLIII, L-LIII, LIV *et seq.*) and forced petitioner to commence serving his sentence in the penitentiary as the only condition upon which the Government would give counsel time to prepare their appeal. Now, finally, petitioner having obtained access to this part of the minutes of the grand jury and having brought the facts to this Court, the Government seeks to avoid the review petitioner has so long struggled to obtain by belittling the incidents related by Judge Learned Hand, by challenging admitted facts concerning the Bentley-Brunini relationship and even by reliance, as we shall show, upon perjured testimony.

In view of the importance of this case to the integrity of the judicial process, we beg the Court's leave to file this short reply brief. For the convenience of the Court, we utilize the numbering and lettering in the Government's Brief in Opposition.

1. In the trial court and in the Court of Appeals, the Government relied almost entirely upon the *Williams* case. Now that all three judges of the Court of Appeals have indicated their view that the *Williams* case is distinguishable because of the absence of any governmental misconduct there,[1] the Government for the first time suggests the analogy of the second-confession cases. *United States* v. *Bayer,* 331 U.S. 532; *Lyons* v. *Oklahoma,* 322 U.S. 596. The analogy fails on the very quotation from the *Bayer* case relied upon in the Government's brief (p. 9); there this Court stated that the second confession could be utilized "after those conditions [precluding its use] have been removed." Here, far from the governmental misconduct

[1] Indeed Judge Learned Hand stated that the *Williams* case was "irrelevant" (Pet. for Cert. p. 50).

having been removed at the time petitioner was giving the testimony that forms the basis of the reindictment, the United States Attorney was deliberately deceiving petitioner and the trial judge at that very moment about the nature of the Brunini-Bentley relationship and about the absence of irregularity in the grand jury proceedings. Throughout its Brief in Opposition, even in its statement of the Question Presented (p. 2), the Government seeks to give this Court the impression that the governmental misconduct ceased with the returning of the first indictment. On the contrary, probably the most reprehensible action in this entire procedure was the deception practiced by the United States Attorney (Pet. for Cert. pp. 14-16, 34-37). And, all apart from this contemporaneous deception, Judge Learned Hand found the relationship between the first and second indictments sufficient to invalidate the latter (Pet. for Cert. pp. 37, 57-58).[2] If the policy of the law is to prevent "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideals reflected in the processes of our courts" (*Ballard* v. *United States*, 329 U.S. 187, 195), it can matter little whether the governmental misconduct occurred before or after the alleged violation of law.

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[2] Judge Hand stated:

"The doctrine of the first of these [the *Silverthorne* case]—that the prosecution may not use evidence that it has unlawfully obtained—must depend, I suggest, upon the premise that the gathering of evidence is a step in the procedure for the punishment of crime; and that to gather it unlawfully is as much a denial of a part of that procedure as would be the denial of any formally prescribed step. Now the finding of the first indictment was a necessary part of the evidence in the case at bar, because without it nothing that Remington said in the first trial would have been perjury, no matter how false it was. I do not see any difference in principle between obtaining the first indictment by the unlawful extraction of evidence, necessary to its support, and obtaining a document by an unreasonable search. Surely this would not be denied in an extreme situation: as, for example, if the prosecution had suborned the witnesses, or threatened to prosecute them, if they did not swear as directed."

The Government nowhere suggests that the question of law raised by petitioner is not an important one. It would have this Court in effect accept its view of this important question without argument on its strained analogy to two cases it deemed worthy of mention for the first time here.

2a. The Government's brief (p. 11) states that petitioner has cast unwarranted aspersions upon Thomas E. Donegan, the prosecutor before the grand jury. Petitioner has cast no aspersions; he has stated facts. Indeed, the Government does not deny the principal fact: that Donegan had been Bentley's personal attorney in 1947 when he was engaged in the private practice of law (R. 1389-90) and had assisted her in recovering $7,200 from the cover job (R. 1388) that she had while she was a spy (R. 1280-5). Nor does the Government deny that Donegan, instead of refraining from participating in this case which involved the credibility, rehabilitation and livelihood of his former client, participated vigorously, to say the least, in bringing about an indictment that would serve her purposes. What the Government apparently resents is the distinguished dissenting judge's narrative account of the means by which Brunini and Donegan obtained Ann Remington's adverse testimony, his conclusion that "oppression and deceit" had been utilized in procuring the indictment (Pet. for Cert. p. 56) and his statement that Donegan, the prosecuting attorney, had failed to intervene (Pet. for Cert. p. 55) to correct Brunini's false assertion that Mrs. Remington had no privilege to refuse to answer—when in fact she had both the marital and self-incrimination privileges.

b. It is quite remarkable that the Government should still make an issue of the financial interest of Brunini in Bentley's book. At the first trial they had Brunini's own

statement to the United States Attorney (R. 1526-27) which they have never been willing to submit to examination by the defense. Prior to the second trial they had an opportunity to submit their version of the facts in a statement under oath in opposition to the defense motion to dismiss which was supported by an affidavit setting forth the literary and financial collaboration of Bentley and Brunini; the Government's failure to submit any such statement under oath is certainly an admission for purposes of this case.[3]

What is even more significant is that this challenge by the Government of admitted facts is predicated upon perjured testimony. The Government states in its Brief in Opposition (p. 12, 13n) that Bentley again denied at the second trial that Brunini had a financial interest in her book and they cite pages 276 and 277 of the transcript of the second trial in support of this position. Here is Bentley's actual testimony on this point:

"Q. Just what did Mr. Brunini do with you on the book?

A. Not a thing.

Q. Did you talk to him about the book?

A. He was writing a book. I was writing a book. We talked to each other about our books.

Q. He had nothing to do with your book at all?

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[3] Furthermore, the Government's statement (p. 12) of the testimony at the first trial of the two disinterested witnesses, Collins and Sefa, is significant principally for its omissions. For example, the Government made no reference to Collins' testimony that the head of the publishing house *and Bentley herself* had stated that the contract giving Brunini a part of the proceeds of the book had in fact been executed (R. 1610-11). Nor did they refer to Sefa's testimony that less than a week before the execution of the second contract which omitted any reference to Brunini's compensation, it was agreed by the head of the publishing house, Bentley and Brunini that Brunini would receive compensation for his work on the book (R. 1546-50). But possibly even more significant than either of these omissions was the failure to mention the testimony of both these disinterested witnesses that the first agreement *had been destroyed* (R. 1594-5, 1601-3). The destruction of documents is hardly the mark of an innocent transaction.

A. Of course not.

Q. Didn't you testify in the last trial that he collaborated with you in this book?

A. I think you will find that there was somebody else who testified to that.

Q. You didn't testify that you collaborated with Brunini in that book?

A. I cannot possibly testify to a lie, Mr. Minton. Mr. Brunini had nothing to do with my book. As two authors, we exchanged ideas, that's all."

This was not a denial of financial interest as the Government indicated in its Brief in Opposition; this was a denial of the very collaboration which Bentley and the Government had previously admitted. Bentley conceded at the previous trial, after first making a denial (R. 1377), that Brunini had gone over her book "the same as any editor would" (R. 1377-79) and had given her both "morale" and "editorial" support (R. 1377-78). Compare for example the following testimony (R. 1378) of Bentley at the first trial with her answers above that Brunini had nothing at all to do with her book:

"Q. I am asking you what Mr. Brunini did in his relations with you.

A. Mr. Brunini did editorial work and Mr. Brunini gave me moral encouragement too, I would say.

Q. What do you mean by editorial work?

A. I am afraid that is a difficult thing to get into Mr. Chanler. I am not familiar with what editors do. They go over it, reparagraph it, cut sentences, suggest that this should be expanded here. It's a whole field.

Q. Mr. Brunini did that with your book?

A. Mr. Brunini, ~~in common~~ with Mr. Sloan, did that."

Furthermore, the Government in its Brief in Opposition filed in this Court in January, 1952 (No. 387, October Term

1951, p. 12) expressly admitted "Brunini's collaboration with Miss Bentley on her book" and, indeed, the Government admits this very "collaboration" here (p. 13). Instead of relying on Bentley's false denial of collaboration as evidence of an absence of financial relationship with Brunini, the Government might better give consideration to indicting her for perjury.[4]

Furthermore, as petitioner has pointed out many times, money is not the sole, or even the strongest, of human motivations. Brunini's speech to the grand jury (GJ. 7806-9)—that Remington was a very minor and unimportant figure in Bentley's story of her espionage activities, who had become extraordinarily important because he had chosen to talk and fight back at Bentley; and that it is extremely important for the American people to be awakened to the dangers that have been related by the ex-Communists, such as Bentley, who have come forward and told their stories, but who have been smeared by persons such as Remington—this speech clearly showed Brunini's teeth, if we may borrow his own phrase (GJ. 7827). Whether his motivation was money or fanatical support of his collaborator, the result was the same.[5]

c. The Government's suggestion (p. 14) that it never occurred to the United States Attorney that petitioner might defend on the ground of the Brunini-Bentley relationship is hardly consistent with his (R. 1527) and their

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[4] It should be recorded here that petitioner's counsel is certain that those preparing and filing the Government's Brief in Opposition were totally unaware of Miss Bentley's perjury. Bentley, however, was well aware of her own untruthfulness for a few lines later she suggests that her previous answers might be "cleared up" (S. 277). This was never done and, at any rate, the crime of perjury had been completed with her false answers. *United States* v. *Norris*, 300 U.S. 564.

[5] The Court has undoubtedly noted that Judge Learned Hand was sufficiently shocked by the conduct of Brunini and Donegan to invalidate the two indictments without reference to the relationship between Brunini and Donegan and the prosecuting witness.

admission (p. 13) that the possibility of dismissing the indictment was sufficiently real to cause the United States Attorney to take the matter up with the Attorney General. Furthermore, if it never occurred to the United States Attorney that petitioner might make this defense, why then his trickery in examining Collins and Sefa, why then his shouting to judge and jury that they were liars, why then his opposition to petitioner's examination of the grand jury minutes by repeatedly assuring the trial judge that those minutes would reflect an utter lack of irregularity in the grand jury proceedings? Is this the conduct of a man to whom it had never occurred that this defense might be availed of by petitioner?

The Government implies (p. 13-14) that the test of the validity of the first indictment is whether Brunini and Donegan used "undue influence" on the other grand jurors. But, as we have shown in our petition for certiorari (p. 30), the test is more properly the irresponsible nature of the grand jury and the unlawful conduct of the foreman and prosecuting attorney. Actually, although this was not necessary to petitioner's case, substantial prejudice has been shown (Pet. for Cert. pp. 30-33). The Government's implication that the only method of voiding an indictment is to put the grand jurors on the witness stand and obtain from them the admission their indictment was the result of "undue influence" is contrary both to reason and logic[6]

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[6] It was this fallacy of "undue influence" that led the majority below, relying upon their earlier decision (191 F. 2d 246, 252) to question whether the Grand Jury minutes of Ann Remington and petitioner showed "undue influence" (Pet. for Cert. p. 47). Indeed, if the test is undue influence on other grand jurors, this could never be shown by the minutes themselves, but only by the later admission of the grand jurors. At any rate, petitioner was precluded from going into this very point by the denial of the hearing he requested in his motion to dismiss (S. XXI).

One other Government suggestion is worthy of mention. This is the reference to Rule 6 (b) (2) of the Federal Rules of Criminal Procedure and the statement that "any possible disqualification of Brunini would not

and the decisions of this Court. *Ballard* v. *United States,* 329 U.S. 187, 195; *Akins* v. *Texas,* 325 U.S. 398, 403-404; *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 225; *Cassell* v. *Texas,* 339 U.S. 282, 283; *Tumey* v. *Ohio,* 273 U.S. 510; *Glasser* v. *United States,* 315 U.S. 60, 75-76.

d. Whether the conduct of Brunini and Donegan was "patient and sympathetic" as the Government contends or constituted "oppression and deceit" as Judge Learned Hand held is for this Court to decide on the record. We find it significant, however, that the Government made no reference to the fact that these patient and sympathetic men were the admitted collaborator and the admitted former counsel of the prosecuting witness whose rehabilitation depended upon petitioner's indictment. We cannot resist, too, the observation that, in calmer times, the Government might not have thought Brunini's "ex-Communist" speech (GJ. 7806-7809) was "patience", that the repeated denial of food to a witness who had stated she was becoming fuzzy and incoherent [7] was "sympathy", and that the threat to show one's teeth (GJ. 7827) was hardly improper (p. 18).

The Government attempts to shrug off the five-day examination of Remington by Brunini and Donegan (Pet. for Cert. pp. 26-28) with the statement that in 400 pages of testimony there are bound to be some questions "not

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have invalidated the indictment" (p. 13). What Rule 6 (b) (2) refers to are legal qualifications such as age, residence and mental competence. 28 U.S.C. § 1861. The Government can hardly be serious in suggesting that "oppression and deceit" practiced in the grand jury room by the prosecuting witness' collaborator and former attorney is analogous to the participation in grand jury proceedings of a juror under 21 or a resident outside the district.

[7] The Government, in its effort to belittle Mrs. Remington's repeated requests for something to eat, carefully refrained from pointing out, though it nowhere denies the fact, that she had flown up from Washington in an airplane early that morning (GJ. 7830) in order to attend the morning session of the grand jury.

strictly relevant" (p. 21n). But it is not the irrelevance of his examination on which petitioner here relies; it is the direct relevance of this examination to the dispute between petitioner and the prosecuting witness. What petitioner complains of is not simply the irrelevance of the questions asked of him, but the fact that they demonstrate that Brunini and Donegan were not impartial Government servants in the grand jury room, but were, on the contrary, serving the private interests of the prosecuting witness. [8]

The Government still has the advantage of the defense. It has the full minutes of the grand jury before it; we do not. We point out, however, that we suggested in the petition for certiorari (pp. 27-28) that the minutes would show that the grand jury took up the Remington case at the direct request of Brunini or Donegan, and this just after another grand jury in Washington, D. C. had refused to indict. The Government's failure to answer this point only reinforces our conviction that, if the Court will examine the minutes which have been denied the defense, it can only conclude that this prosecution was instituted to vindicate Bentley, an ex-Communist whose veracity petitioner had dared challenge and whose rehabilitation was the motivating force of both Brunini and Donegan. The grand jury process is not safe while action such as this goes uncondemned.

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[8] It might also be pointed out that, in attempting to justify the conduct of Brunini and Donegan, the Government brief assumes that Remington was in fact proved guilty on the very charges that either have been dropped or not proven. Thus, on page 19 of their brief, the Government states as a fact "that dues had been paid in the presence of Miss Bentley", when, of course, the jury in this very case disagreed on this very question. Then, on page 20, the Government refers to the warning to petitioner that they had proof of his membership in the Communist Party. This is the very charge that the Government has now conceded cannot be proved.

## Conclusion

The Government cites in its brief (p. 7) the statement of this Court that perjury is a serious crime aimed "at the probable wrong done the administration of justice by false testimony." *United States* v. *Williams*, 341 U. S. 58, 68. We share this view. The question before the Court, however, is whether the probable wrong done the administration of justice by petitioner's statements for which he was convicted—his denial of knowledge of the existence of the Young Communist League at Dartmouth College many years earlier and his denial of giving information to Bentley to which she "was not entitled" (not secret)—is greater than the probable wrong done the administration of justice by Foreman Brunini, Prosecutor Donegan, and United States Attorney Saypol. We confidently believe that this is an important question worthy of this Court's consideration.

Respectfully submitted,

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(2965)